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THE

MINING REPORTS.

CONTAINING THE CASES ON THE

LAW OF MINES

FOUND IN THE AMERICAN, ENGLISH AND CANADIAN REPORTS
CHRONOLOGICALLY ARRANGED

WITH NOTES AND REFERENCES.

BY

R. S. MORRISON AND EMILIO D. DESOTO,

OF THE COLORADO BAR.

VOL. XXII.

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MINING REPORTS

VOL. XXII.

RACHEL D. POTTER v. WM. P. REND ET AL.

(201 Pennsylvania 318; 50 Atl. 821. Supreme Court. Jan. 6, 1902.)

[1]**Construction of instroke appurtenance.** Where an operator of coal mines on a large scale on about 4,000 acres abutting on a small tract of 152 acres purchased the coal under such smaller tract, "together with the privilege of mining and removing through any entries made in said coal other coal belonging, or which may hereafter belong, to the grantee," the deed gave the grantee right to bring the coal from other land through the entries in the small tract, and not merely the right of passage through such entries.

No right to deposit gob from foreign coal. The same deed gave the right to sink a shaft, to deposit on the surface debris taken from such shaft and other privileges—but the right to deposit debris from the foreign coal was not granted.

Where vendee of coal has the option to buy a part of the surface at a fixed price his permanent occupation of the surface is an election to buy and pay for the ground he has occupied.

Such obligation to pay may be enforced by action at law and the aid of equity is not needed.

Laches of surface owner. Where the surface owner allows the owner of the coal to occupy the surface with costly improvements for

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[1]See *Webber* v. *Vogel*, 19 M. R. 639, and notes. *Madison* v. *Garfield Co.* 21 M. R. 358.

many years she cannot ask a court of equity to prevent his removal of the same.

No estoppel by laches as to future trespasses. Laches which will prevent equitable aid concerning past trespasses does not prevent the party from electing to forbid continuance of the trespass and she may enjoin as to threatened future wrongful acts.

Appeal from Court of Common Pleas, Allegheny County.

Bill by Rachel D. Potter against William P. Rend and others to enjoin the removal of mining improvements located on plaintiff's premises. From a judgment dismissing the bill, plaintiff appeals. Reversed.

The plaintiff filed a bill, praying an injunction restraining the defendant (*a*) from entering upon and using for any purpose the surface of the land described in the bill, and (*b*) from operating or removing the mining plant and appliances. W. P. Rend was not served. Answers were filed by the other defendants. From the pleadings and testimony the following facts were found, by BROWN, J.

1. On March 16, 1883, the plaintiff, with her husband, for a consideration of $11,456.25, by deed of that date, conveyed to William P. Rend, his heirs and assigns, all the coal underlying a tract of land in South Fayette township, said county, containing 152 acres and 120 perches, with the following mining rights and privileges:

"Together with the free and uninterrupted right into said coal and under said land, for the purpose of digging, mining, and carrying away said coal; together with the privilege of mining and removing through any entries made in said coal, other coal belonging, or which may hereafter belong, to the said party of the second part, his heirs and assigns, and the said party of the second part, his heirs and assigns, shall have the right to mine and take away the coal underlying said land, free, clear and discharged of all liability for any damages that may result or happen to said tract of land, the surface or springs thereof, or any improvements thereon, by reason of mining and taking away said coal; and also enter upon the said surface of said land for the purpose of taking out and placing on the same, any material that may be necessary in

operating the coal underlying said land; with the right to sink a shaft for the purpose of taking out the coal underlying said land, at any point the said party of the second part, his heirs and assigns, may select; with the privilege to the party of the second part to buy at the mouth of said shaft three acres of surface, at the rate of seventy-five dollars per acre, and also with the right to make openings in the surface for ventilation or drainage; and with the right to deposit on the surface, debris taken out in sinking said shaft, or air or water openings necessary in taking out the coal underlying said tract of land."

2. At this date Rend owned large tracts of coal adjoining and in the vicinity of the Potter farm, and subsequently became the owner of other bodies of coal, all of which he operated and mined in connection with the Potter coal as one large mine.

3. About 1884, for the purpose of ventilating and draining his mining plant, Rend sunk shaft No. 3 on the Potter farm, and at this shaft made additional improvements—erecting a ventilating fan, boilers and engines and air compressors for operating mining machines.

4. Some time after the sinking of shaft No. 3, Rend sunk shaft No. 4 on the Potter farm; erected at its mouth a tipple, with hoisting machinery for bringing up coal; screens and devices for loading into railroad cars, boilers and engines covered by a wooden building, a blacksmith shop and steam pump, and constructed a railway line for hauling slack as fuel to the boilers at shaft No. 3 and for carrying away ashes. Shaft No. 3 was used for draining and ventilating the coal areas in the Potter and adjacent tracts. When shafts Nos. 3 and 4 were completed and the machinery in place, the coal mined in these tracts—about 300 tons daily—was carried through shaft No. 4 to the surface and loaded upon cars.

5. In 1896, Rend discontinued the use of compressed air as power for operating his mining machines, and adopted electricity for transmitting power to run the mining machines and transport the coal, and to that end put up new boilers, an electric dynamo and appliances. Ventilating by electricity was not in general use in 1883, in the vicinity of the Rend mine, the furnace method being generally used. Electric mining was introduced at a later period.

6. The buildings, boilers, machinery, railway and appliances erected by Rend on the surface of the Potter farm occupy an area of about seven acres, and are sufficient in power and capacity to ventilate, drain and operate the Potter and other properties adjacent owned by Rend and were used by him for that purpose until his rights passed to the defendant companies.

7. The plaintiff was a married woman from the execution of the Rend deed, in 1883, until the filing of the bill, in 1899.

8. The area of unmined coal in the Potter tract is about thirty-two acres, a portion consisting of pillars for supporting overlying strata and keeping entries open for mining operations. All this coal (and other strata of coal, if any there be), Rend, his heirs and assigns, have the right to mine and take away, and the time for exercising this right has not yet expired.

9. The buildings, boilers, machinery, railway, pumps, dynamo and appliances erected by Rend (and now owned by the defendant companies), are essential to the operation of the coal property, and are trade improvements or fixtures usual and customary in the business of mining and operating coal properties. And these operations include the right of driving shafts and airholes from the surface of the land for carrying air into the mine, for ventilation, for pipe lines to carry compressed air or electricity for operating mining machines, and for lifting water from the coal areas, including the old workings connected with the mine.

10. The defendants alone have authority to determine, in accordance with good usage, the method of mining and ventilating, except as controlled by statutory regulations.

11. From the date of the Rend deed (1883) to the filing of the bill (1899,) the plaintiff, by herself or tenants, had possession of the surface of her farm. And all the trade improvements during that time were placed thereon with her full knowledge and without objection.

W. O. McNARY and M. H. STEVENSON, for appellant.

JOHN G. MACCONNELL and A. M. NEEPER, for appellee.

DEAN, J. The plaintiff, the owner of a farm of 152 acres of land in South Fayette township, Allegheny county, on 16th of March, 1883, joined by her husband, conveyed all the coal thereunder, with certain mining rights on the surface, to William P. Rend, and through him the property described in the deed passed in September, 1899, to the other two defendants. At the date of the conveyance to Rend he was a coal operator on a large scale on about 4,000 acres of land surrounding or abutting on the Potter tract. Rend, during his occupancy under the deed, caused a mining or lifting shaft to be sunk, and a mine to be opened under the land.

He located the shaft at a point by him deemed suitable for mining purposes on this tract and those adjoining which he had before that owned. During his occupancy—a period of about 17 years—he mined out and removed all the coal on the Potter tract except about 15 acres. In carrying on his mining operations during that time he erected contiguous to the shaft numerous buildings and improvements, consisting of stables for mules, sheds, and coal tipples, railroad tracks, water tanks, electric plants with boilers, engines, and dynamos, and other equipment, not only for the mining of coal under this tract, but under his other land adjoining it. These buildings and improvements practically cover from 7 to 20 acres, and exclude plaintiff from the occupancy of about that quantity of land. During his operations Rend dumped on this 20 acres large quantities of gob and refuse, coming, not only from his mine under the Potter tract, but also from his other mines adjoining it, from which there was access to the shaft. The defendants claim the right to remove all the buildings, machinery, and other improvements put by Rend on the surface during his mining operations. They had already, at the date of filing this bill, removed part, and it is averred that it is their intention to remove all. The plaintiff filed this bill for an injunction to restrain them from such removal; also from continuing to dump gob on her land; further, that defendants be ordered to remove gob already dumped and ashes and cinder deposited on the surface, and for further relief. Defendants, under their deed, claim the right to erect improvements upon so much of the surface as they have appropriated, and the right to remove them; further, that plaintiff, by her silence and conduct during Rend's occupancy, is estopped from denying such interpretation of the deed as they have put upon it by their acts.

The court below adopted defendant's interpretation, and dismissed the bill, at plaintiff's costs. She now brings this

appeal, in which she assigns for error the interpretation of the deed and the opinion and decree of the court below.

The first question to be answered is, what passed to Rend by the deed? After granting all the coal underneath the land, it makes this further grant of rights and privileges: "Together with the free and uninterrupted right into said coal and under said land, for the purpose of digging, mining, and carrying away said coal, together with the privilege of mining and removing through any entries made in said coal other coal belonging or which may hereafter belong to the said party of the second part, his heirs and assigns; and the said party of the second part, his heirs and assigns, shall have the right to mine and take away the coal underlying said land free, clear, and discharged of all liability for any damages that may result or happen to said tract of land, the surface or springs thereof, or any improvements thereon by reason of mining or taking away said coal, and also enter upon the said surface of said land for the purpose of taking out and placing on the same any material that may be necessary in operating the coal underlying said land, with the right to sink a shaft for the purpose of taking out the coal underlying said land at any point the said party of the second part, his heirs and assigns, may select, with the privilege to the party of the second part to buy at mouth of said shaft three acres of surface at the rate of $75 per acre, and also with the right to make openings in the surface for ventilation or drainage, and with the right to deposit on the surface drainings taken out in sinking said shaft, or air or water openings necessary in taking out the coal underlying said tract of land.

The words, "with the privilege of mining and removing through any entries made in said coal other coal belonging or which may hereafter belong to the said party of the second part," it is argued by appellant, conferred on the grantee no right to bring the coal from other land through entries

in the Potter mine to the bottom of the shaft, and there raise it to the surface on the plaintiff's land; that it only gave the right of passage through the entries. This construction is too narrow. Take the surroundings: Rend owned a large acreage of coal abutting on the Potter tract. He wanted an outlet. By getting the Potter coal, with the control of it, instead of an underground haul through three or four thousand acres, he had a comparatively short distance to daylight in the 152 acres, on which he had the right to sink a mining shaft. The right of passage through the entries on the Potter tract meant passage through them to their exit, whether by drift or shaft. This is the only reasonable interpretation of this language in view of the surroundings of the parties at the date of the contract. Such surroundings are always proper for consideration in ascertaining the intention of the contracting parties, where their intention does not expressly appear by the writing.

The next question is, what privilege was granted on the surface? We answer, the right to make openings for ventilation or drainage, with the right to deposit on the surface the earth or other material excavated in making such openings. This privilege extended only to such excavations as were necessary to mining the coal under the Potter tract.

Then, further, Rend had the right, discharged of all liability for damage, to erect mining improvements on the surface; further had the right "to enter upon the surface of said land for the purpose of taking out and placing on the same any material that may be necessary in operating the coal underlying the land, * * * with the privilege to the party of the second part to buy at the mouth of said shaft three acres of surface at the rate of seventy-five dollars per acre." He had the right to deposit the excavations from the mining shaft without charge. This would be but a small area of the surface. But he had also the right to more, if, as probable, the refuse of the mine would require more.

Therefore he stipulated for the right to purchase three acres, and also the price. By the deed he acquired no right to deposit gob from other mines on the surface of this land. There is not a word in the deed indicating the intention of the grantor to confer such right. And this is in accord with the oral testimony. George Dickson negotiated the sale for her. He testifies as follow: "Q. For what purpose did Mr. Rend say he wanted the three acres at the mouth of the mine? Ans. He said he wanted it for an air and water course, and to put the débris on from under his land." Rend was not a tenant of the plaintiff. She subdivided her land horizontally. The division was into coal and farm land. Rend did not lease the coal, but took an absolute conveyance of it. Therefore he took just what he got by his deed,—the coal. No implied right to surface occupation as a tenant followed. As to surface right, he took what was expressed in his grant, and no more. And, clearly, when this was for only a temporary and specific purpose, ending with the exhaustion of the coal on the Potter tract, the grantor acquired no title to the temporary improvements, because the deed gave her none. He could buy, if he chose, three acres, to make deposits from operations in the Potter mine; but that was all. Any appropriation beyond this quantity was a trespass, for which he was answerable in an action at law if Mrs. Potter had chosen to treat him as a trespasser. It is argued by appellant's counsel that the use of even three acres was a trespass, because Rend never paid nor offered to pay the contract price, but by appropriating three acres he impliedly bound himself to pay the price, and her remedy at law on the contract was adequate.

As we have said, this exclusion of the plaintiff from the enjoyment of the surface beyond the three acres was, if she had chosen so to regard it, a trespass, for which she had an action at law, and equity would have restrained continuing or further trespass. But for 12 or 15 years she stood by and

made no complaint. She saw her grantee occupy the land with valuable and costly improvements without objection, and now invokes the strong arm of equity to prevent the removal of any part of them. Under the law he has the right to remove fixtures put there for a specific and temporary purpose. By her conduct she allowed them to be placed on the land without denying his right or asserting hers. Equity will not now restrain their removal. Whether he is answerable for use and occupation of her land beyond the three acres, or whether by her silence up to the filing of this bill, she has estopped herself from claiming compensation for such use and occupation, is for the law courts to determine. If we even undertook to enter into that question there is no finding of fact on which to base a decree. Plaintiff alleges defendant appropriated 20 acres; defendants allege only 7. Plaintiff alleges the surface of her land was used as a deposit for refuse material to a large extent from other mines, which defendants deny. If these disputed facts are to be found at all they should be found by a jury.

But although defendants for years, without right, yet without objection on her part, used the surface, by filing this bill she did then object; therefore further trespass must be stopped by injunction. It can go no further.

We have thus discussed and passed on the main questions, and those on which the issue turns. The prolonged discussion in the paper books of the law governing the relation of landlord and tenant and the implied right of the tenant to remove trade fixtures has but little application. Plaintiff was a grantor of land by absolute deed. Rend was the grantee of the land, with certain privileges on other land, which did not pass by the deed. The privileges were not for a term, or at will, but temporarily for a specific purpose plainly expressed. There was nothing to be implied outside that expressed.

The decree of the court below dismissing the bill is reversed, and it is ordered that the bill be reinstated; further,

that injunction issue restraining the defendants, or any or either of them, from depositing any gob or other excavated material from the mines outside the three acres for which the privilege of purchase is stipulated in the deed. Further, it is ordered that appellees pay the costs.

CEDAR CANYON CONSOLIDATED MINING CO. v. W. J. YARWOOD ET AL.

(27 Washington 271; 67 Pac. 749. Supreme Court. Jan. 10, 1902.)

[1]**Presumption of purchase for joint benefit.** The presumption is that a conflicting title bought in by one of the co-tenants was acquired to protect the common title; and the other co-tenants have a reasonable time after they learn to the contrary, that he claims adversely, to pay their proportion of the cost and get the benefit of it.

Co-tenant buys next claim to secure apex. Where a joint tenant of a mining claim purchases a controlling interest in a claim adjoining on the side line, for the reason that he supposes that the apex of the mine worked in the former claim is located in the latter, and for the sole purpose of protecting his interest in the former claim, and not as an independent investment, the purchase inures to the benefit of the co-tenants, and cannot be held by the purchaser as his separate property.

Discovery after location. A mining claim located before the discovery of minerals thereon becomes a valid location, subject to ownership in co-tenancy, on the subsequent discovery of minerals by the locator; and one of the tenants afterward purchasing the adjoining claim, in which the lode worked in the former claim apexes, cannot hold the interest so acquired as his individual interest on the ground that the co-owners of the former claim were mere trespassers on the first claim, and not co-owners thereof.

Cannot question the common title. A co-tenant who purchases a conflicting title, or his successor having notice of all the facts, will not be permitted, in the contest over the title, in which the other co-owners claim that the purchase of the conflicting title inures to their benefit, to question the common title of the co-tenants.

Where the trial court finds that a corporation succeeding to the rights of the co-tenant in the adjoining claim purchased by him had knowledge of the co-tenancy, and the corporation does not except to such finding, it will be held on appeal to have had full notice of the rights of the other co-tenants in the conflicting title purchased by its grantor.

Practice on decree. Where the only issues in an action to determine

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[1] *Malaby* v. *Rice*, 21 M. R. 29.

A relocation by one co-tenant is for the joint benefit of all. *Perelli* v. *Candiani*, 42 Oreg. 625; 71 Pac. 537.

conflicting mineral rights relate to a single lode, it is not error to refuse to quiet defendant's title to a half interest in the entire claim traversed by such lode, though plaintiff owns the remaining interest therein.

Appeal from Superior Court, Spokane County; William E. Richardson, Judge.

Action by the Cedar Canyon Consolidated Mining Company against W. J. Yarwood and others for damages for ore mined from a lode apexing in plaintiff's mining claim, and for an injunction. From the decree plaintiff and defendants both appeal.

Modified.

McBRIDE & FOLSOM, for plaintiff.

M. J. GORDON and HAPPY & HINDMAN, for defendants.

HADLEY, J. The plaintiff, the Cedar Canyon Consolidated Mining Company, a corporation, is the owner of a lode mining claim known as the "Elephant" claim, situated in Springdale mining district, in Stevens county, Wash. To the south and east of the Elephant, and adjoining it, is the Legal Tender mining claim, which was located by the defendant, W. J. Yarwood. This location was made subsequently to the location of the Elephant claim. At the time of the commencement of this action the said defendant W. J. Yarwood and his codefendants Eli Yarwood, Ed. Yarwood, and David Yarwood, were, and for some time prior thereto had been, the owners of an undivided half interest in the Legal Tender claim, and the Deer Trail Consolidated Mining Company, a corporation, was the owner of the remaining undivided half interest therein. For a considerable time prior to the commencement of this action the Yarwoods and the last-named corporation were in joint possession of the

Legal Tender claim. Prior to the joint ownership and possession above mentioned the Yarwoods and the Deer Trail No. 2 Mining Company, a corporation, jointly owned and were in possession of the said claim, and while such joint ownership existed the last-named corporation became the grantor of the Deer Trail Consolidated Mining Company, and the latter succeeded to the ownership of said undivided half. During the period covered by the said respective joint ownerships the owners were jointly engaged in mining ores from said claim, and shared the profits and divided the expenses connected therewith. The defendant W. J. Yarwood was the superintendent of such mining operations at the mines. These operations resulted in a profit approximating $60,000. While the Deer Trail No. 2 Mining Company was the owner of said undivided half interest in the Legal Tender, and while it was jointly engaged with the Yarwoods in mining ore within the limits of the Legal Tender claim, that company, through its president and general manager, Charles Theis, purchased from divers parties an undivided four-sevenths interest in the Elephant claim. In October, 1899, and while the Deer Trail No. 2 Company was jointly engaged with the Yarwoods in mining the Legal Tender claim, it entered into an agreement in writing with Hogan, Cole & Wolf, who were then the owners of the remaining three-sevenths of the Elephant claim, by the terms of which the plaintiff corporation was to be organized, and in the agreement it was provided that Hogan, Cole & Wolf should convey to plaintiff corporation, when organized, their said three-sevenths interest, and the Deer Trail No. 2 Company was to cause the remaining four-sevenths of the Elephant to be conveyed to the plaintiff corporation. In consideration of said respective conveyances, the said Deer Trail No. 2 Company was to have and receive four-sevenths of the entire capital stock of the plaintiff company, and the said Hogan, Cole & Wolf were to have and receive the remaining

three-sevenths of said capital stock. It was further provided in the agreement that the Deer Trail No. 2 Company should have the right to name a majority of the trustees of the plaintiff corporation, and all of the officers thereof, except the secretary. In pursuance of said written agreement, the plaintiff corporation was organized in the latter part of October, 1899, and, as such corporation, took and received title to the Elephant claim from said Deer Trail No. 2 Mining Company and from Hogan, Cole & Wolf, and thereafter caused the stock of the plaintiff company to be issued in accordance with the said agreement as above outlined. The action was brought in the superior court of Stevens county, but by stipulation was removed to Spokane county, and was tried by the superior court of Spokane county. The said Yarwoods, together with one C. C. May, and the said Deer Trail Consolidated Mining Company, were made defendants in the action. The plaintiff, by its complaint, seeks to recover damages to the extent of $100,000 for ores extracted within the limits of the Legal Tender claim, upon the theory that the vein from which said ores were extracted apexes within the limits of the Elephant claim. The complaint also asks for an injunction to prevent further mining operations on the part of the defendants within the limits of the Legal Tender claim. The defendant the Deer Trail Consolidated Mining Company did not answer the complaint. The defendants Yarwood answered the complaint and denied that the vein from which they and their co-tenants extracted ores within the limits of the Legal Tender claim had or has its apex within the limits of the Elephant claim, and they also set up an equitable defense to the action, and by way of cross complaint that a co-tenancy existed between them and the Deer Trail No. 2 Mining Company and the Deer Trail Consolidated Mining Company during the time said ore was being extracted, which co-tenancy included both the joint ownership of said Legal Tender claim and the joint operation of

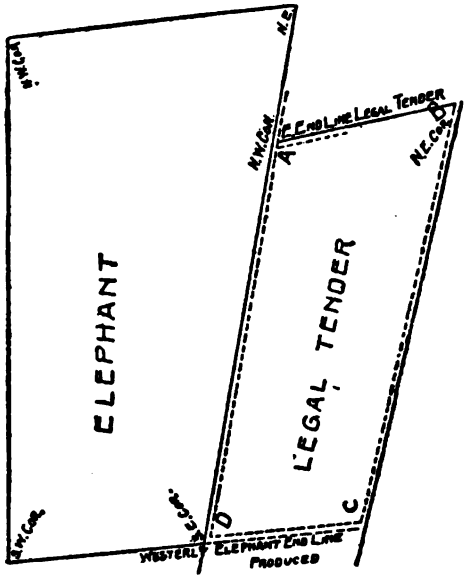
the mine therein while said ores were being extracted. They also charged plaintiff with full knowledge of the existence of such co-tenancy, and with full knowledge, at the time it purchased the interest in the Elephant claim from the co-tenant of the Yarwoods, that such interest had been purchased by their co-tenant at a time when the co-tenancy existed. They therefore claim that plaintiff is estopped to maintain the action, and ask that their title to the undivided half interest in the Legal Tender may be quieted, and they be permitted to share in the four-sevenths interest in the Elephant, which was purchased by their co-tenant, and that their title to one-half thereof, or a two-sevenths interest, be quieted. To said cross complaint of the Yarwoods, the plaintiff company, and the codefendant Deer Trail Consolidated Mining Company made answer. It being the view of the trial court that the pleadings raised both legal and equitable issues, when the case came on for trial the court proceeded to hear evidence upon the equitable issues, and, without making any findings or decisions thereon, but reserving such decision as to the equitable issues, further proceeded to impanel a jury to try the question of trespass, which involved the identity of the vein from which the ores were extracted within the limits of the Legal Tender claim by the defendants Yarwood and their co-tenants. The jury trial resulted in a verdict for the plaintiff. The Yarwoods moved for a new trial, and pending the hearing thereon the court made its findings and conclusions upon the equitable issues. After the findings and conclusions were made, the Yarwoods moved the court to set aside the verdict upon the further ground that upon the findings and conclusions of the court as to the equitable issues the plaintiff was estopped to prosecute this action, and that no effect could be given to the verdict. This motion was also overruled. The plaintiff and the defendant the Deer Trail Consolidated Mining Company also each moved for a rehearing and new trial upon the equitable issues, which

motions were each overruled. The court then proceeded to judgment and decree. The judgment recites the verdict of the jury, wherein they found that plaintiff was entitled to recover $1 damages, and that it is entitled to the possession of the vein or lode outside of the side line of the Elephant claim and between the end lines extended through the Legal Tender claim to its southeast line. It is adjudged that the plaintiff is the owner of the lode or vein of the Elephant claim, said vein having its apex within the side lines of the Elephant claim, as determined by the verdict of the jury. It is further found that said vein passes out of the Elephant surface ground on its dip into and underneath the surface of the Legal Tender claim, and it is adjudged that plaintiff is entitled to recover from the defendants five-sevenths of all that portion of the vein which lies underneath the surface of the Legal Tender, and to the easterly of a plane drawn downward vertically through the westerly end line of the Elephant claim extended southerly in its own direction, and within planes drawn downward vertically through the easterly end line of the Legal Tender claim and the side lines of the same. The location of that portion of the vein of which plaintiff is adjudged to be entitled to recover from defendants an undivided five-sevenths is more particularly shown by the following diagram, which is a copy of the diagram attached to the decree, and marked "Exhibit A." The location of said portion of the vein is indicated on the diagram by the planes drawn downward vertically through the dotted lines A—B, B—C, C—D, D—A.

It is further adjudged that the defendants Yarwood are entitled to the remaining two-sevenths of that portion of the Elephant vein or lode lying underneath the Legal Tender surface and within the planes above described, but are not entitled to any other portion of the Elephant claim or lode. It is decreed that the title of the plaintiff be quieted to all of the Elephant claim and the lode apexing therein, except-

ing the part above described as belonging to the Yarwoods, and the defendants are perpetually enjoined from interfering with the possession of plaintiff.

From the decree of the court there are two appeals. The plaintiff appeals from that portion of the decree which determines that the defendants Yarwood are entitled to two-



sevenths of the Elephant vein which lies within the limits of the Legal Tender claim, it being the contention of plaintiff that the Yarwoods are not entitled to any portion thereof. The defendants Yarwood have appealed because of the refusal of the court to find and decree that their title shall be quieted to a half interest in the Legal Tender claim, and also to one-half of four-sevenths of the Elephant claim, purchased by their co-tenant. The plaintiff's appeal is prosecuted wholly on the judgment roll and the facts as found by both the court and jury. No exceptions to the findings are urged by the plaintiff, but it is insisted that they do not support

that part of the judgment which decrees that the Yarwoods are entitled to two-sevenths of the Elephant lode lying beneath the surface of the Legal Tender claim. By the issues submitted to the jury they were called upon to determine by their verdict whether the vein upon which defendants had been operating within the limits of the Legal Tender has its apex within the limits of the Elephant. The verdict determined that the apex is within the Elephant claim. It is well settled that the holder of a valid mining location within which a vein or lode apexes is the owner of the whole vein, and he has the right to follow its dips and angles for the purpose of mining when it dips under and leads without the side lines of his claim as marked and located upon the surface. As a legal proposition, it is unnecessary to further discuss this question, since it is not controverted by the parties here. If, then, the plaintiff is the owner of the claim where the Elephant lode apexes, it is also the owner of that portion of the vein which lies within the limits of the Legal Tender, and is entitled to the possession thereof, unless there be some equitable reason in favor of the Yarwoods why plaintiff is not entitled to the whole of it as against them.

From the statement heretofore made it will be remembered that the Yarwoods, together with their co-tenants, had for some years been mining from this vein within the limits of the Legal Tender claim. While the Elephant location was older than that of the Legal Tender in point of time, yet it appears that much more work had been done in the way of developing and mining within the limits of the latter than within the former claim. We think the Yarwoods and their co-tenants began and continued in good faith to operate upon the vein in question, believing it to belong to the Legal Tender claim. Later developments upon the Elephant claim, however, satisfied its owners that the vein upon which the Yarwoods and their co-tenants were operating was the same vein that apexed within the Elephant, and thereupon such

claim was asserted. The co-tenancy had been operating for some years with profitable results, and when this adverse claim to the ore they were mining was asserted they feared an interference by way of a suit demanding an accounting or otherwise. Based upon this fear of interference, Charles Theis, as president of the Deer Trail Company, a co-tenant and mining partner of the Yarwoods, purchased for his company the four-sevenths interest in the Elephant, as heretofore stated. Concerning this purchase Mr. Theis testified as follows:

"Q. You bought it in order to secure them against the probabilities of a lawsuit? A. Yes, Sir. It had no ore of any kind in sight—of any kind that I could find. * * * At the time the purchase was made it was made solely for the purpose of preventing this litigation. * * * Q. And it was for the purpose of protecting your legal Tender interest that you made that investment in the Elephant? A. Yes, sir. * * * Q. Well, you made the investment with the expectation of turning it over to your company? A. Yes, sir. Q. And for the purpose of protecting the company in its Legal Tender investment? A. Yes, sir. Q. That was the purpose, too, for which you acquired the additional interest? A. Yes, sir. Q. The same purpose. Had the same thing in view that you had in view when you acquired the May interest? A. Yes, sir. Q. Namely, to protect the Legal Tender property? A. To protect our interest in the Legal Tender property."

It seems clear, therefore, that the purchase was not made primarily as an independent investment in the Elephant, but for the sole purpose of protecting the operations of the Deer Trail Company and the Yarwoods within the Legal Tender claim from being interrupted by the owners of the Elephant. The Yarwoods contend that the relation of co-tenancy which existed between them and the Deer Trail No. 2 Mining Company was such that any interest in the Elephant claim purchased by said company inures to the joint benefit of the Yarwoods and their co-tenants in the Legal Tender. Such is the general rule in relation to purchases made by a tenant

in common when made for the benefit and protection of the common property. *Franklin Co.* v. *O'Brien* (Colo. Sup.) 43 Pac. 1016, 55 Am. St. Rep. 118; *Mills* v. *Hart* (Colo. Sup.) 52 Pac. 680, 65 Am. St. Rep. 241; *Turner* v. *Sawyer,* 150 U. S. 578, 14. Sup. Ct. 192, 37 L. Ed. 1189; *Cecil* v. *Clark* (W. Va.) 30 S. E. 216; *Montague* v. *Selb,* 106 Ill. 49; *Bracken* v. *Cooper,* 80 Ill. 221; *Boyd* v. *Boyd* (Ill.) 51 N. E. 782, 68 Am. St. Rep. 169. Plaintiff contends that in legal contemplation no co-tenancy existed here, because there was no valid mineral claim to which a co-tenancy could attach; that the vein upon which the Yarwoods and their co-tenants were working belonged to the Elephant, and they were therefore simply joint trespassers. It is urged that the purchase of the interest in the Elephant was that of a distinct and independent property, which bore no relation to any common property to which the so-called co-tenants had any lawful claim. It is asserted that no discovery of mineral was made within the Legal Tender at the time the location thereof was made. It appears from the evidence, however, that valuable mineral was at some time discovered within the Legal Tender, and the location being properly marked and location notices being posted and recorded, the claim became, as between the Yarwoods and their co-owners, a valid location. As between themselves and the government, they had title to the property, and were entitled to hold it until some one other than the government could show a better or paramount title. In the absence of intervening rights, the fact that mineral is not discovered on a claim until after the notice of location is posted and the boundary marked is immaterial, and, where the discovery is the result of work subsequently done by the locator, his possessory rights under his location are complete from the date of such discovery. *Nevada Sierra Oil Co.* v. *Home Oil Co.* (C. C.) 98 Fed. 673; *Erwin* v. *Perego,* 35 C. C. A. 482, 93 Fed. 608; *Jupiter M. Co.* v. *Bodie M. Co.* (C. C.) 11 Fed. 666; 1 Lindl. Mines,

§ 335, and cases cited. It follows that the Yarwoods and their co-owners had perfected a valid mining location, which was good as between themselves and the government, unless a third person could show a superior title. It was for the purpose of controlling such superior title in the interest of their common property that the purchase of the interest in the Elephant was made. The common title was assailed. It was believed that another had a better title, and one of the holders of the common title purchased an outstanding interest in such superior title. Under such circumstances we believe there was a tangible substance to which a co-tenancy would attach, and that the parties sustained to each other the relation of co-tenants. A co-tenant will not be permitted to question the common title upon a contest between him and his co-tenants. *Bornheimer* v. *Baldwin,* 42 Cal. 27; *Olney* v. *Sawyer,* 54 Cal. 379; Freem. Co-Ten. (2d Ed.) § 152. When the Deer Trail Mining Company No. 2 purchased an interest in the Elephant claim, it was not in a position to question the common title to the Legal Tender, and, since the plaintiff company is the successor as grantee of the interest so purchased, it is not in position to assail the common title as a basis for establishing its own right of recovery. It must recover upon the strength of its own title, and we therefore think it is estopped to claim that there was no valid location made on the Legal Tender claim.

Plaintiff urges that it is not bound by the knowledge which some of its incorporators may have had as to the rights of the Yarwoods in the Elephant. The Trial court, however, made the following record:

"That the Cedar Canyon Consolidated Mining Company in this action had notice of the co-tenancy existing between the Yarwoods and the Deer Trail No. 2 Mining Company, and succeeded to the interests of the Deer Trail No. 2 Mining Company in and to the Elephant claim with full knowledge of said co-tenancy and of the rights of the Yarwoods thereunder."

Plaintiff did not except to the above, and it must be held that it had full notice of the rights of the Yarwoods.

It is further urged by plaintiff that, even if a co-tenancy did exist, the Yarwoods have lost their right to participate in the purchase by failure to offer to contribute their proportion of the purchase price within a reasonable time. The four-sevenths interest in the Elephant was acquired at different times, and from different people, but was all acquired while the purchasing company and the Yarwoods were jointly working the deposits within the Legal Tender claim. When Mr. Theis, the president of the purchasing company, advised W. J. Yarwood of the purchase of the first one-fourth interest, Yarwood said to him that at the price paid he "would like to be in on it." Pending this time and the time the other purchases were made, Yarwood was working at the mine and the parties continued to share the profits of their joint enterprise. After the other purchases had been made, and when Yarwood was in the office of Theis in Spokane, he was informed of the other purchases, this being the first time the Yarwoods had known of the other purchases. Yarwood then claimed that the Yarwoods were entitled to a share in the interest purchased. Not until that time had the Yarwoods learned that it was the intention of the purchasing co-tenant to assert an exclusive right to the interest purchased. There was some testimony to the effect that there were joint funds on hand, which it was supposed would be applied to the purchase of the first one-fourth interest, of which purchase the Yarwoods had learned; but, however that may have been, no request or demand was ever made by the co-tenant of the Yarwoods that they should contribute to the purchase price, and they had never refused to contribute.

"But before a co-tenant will be considered to have forfeited his right to participation by his delay, it must appear that he had notice not only of the purchase of the outstanding title by his co-tenant but also of the exclusive claim set up by the latter. He

may reasonably presume that the purchase was made in support of the common title, and may act upon that presumption, considering the outlay simply as a joint charge to be settled and accounted for as any other necessary expense incurred in protecting the joint estate. The burden is upon the purchasing tenant to show that his co-tenant had notice of the purchase and of the exclusive claim set up by him." 17 Am. & Eng. Enc. Law (2d Ed.) pp. 679, 680.

"We concede the correctness of the doctrine announced in *Mandeville* v. *Solomon*, 39 Cal. 133, and the cases therein cited, that, where one tenant in common purchases an outstanding title for the benefit of his co-tenants, the latter must, within a reasonable time, contribute or offer to contribute their proportion of the purchase money. But that principle applies to cases only where the purchasing co-tenant wishes to be paid, and conducts himself accordingly." *Boskowitz* v. *Davis*, 12 Nev. 446, 468, 469.

"A tenant in common holds a several interest in the lands, which is so far identical with his co-tenants' interest that, in all matters affecting the estate, he will be regarded as acting for them as well as himself. He cannot, therefore, purchase an outstanding adverse title, and set it up against his co-tenants, if they are willing to reimburse him pro rata for the money by him so expended. He will be regarded as holding the title he thus acquires in trust for his co-tenants until the presumption is repelled by their refusal to contribute in payment of his outlays." *Weare* v. *Van Meter*, 20 Am. Rep. 616, 617.

Upon this subject of willingness and readiness to contribute the court found as follows:

"That the defendants Yarwood have at all times since receiving knowledge of the purchase by the Deer Trail No. 2 Mining Company of said four-sevenths interest in the Elephant claim been willing, and now are willing and ready, to contribute their proportion, namely, one-half of the expense and cost of the purchase price of said four-sevenths interest, but that the said Deer Trail No. 2 Mining Company have heretofore and now refuse to permit said defendants Yarwood to participate in the benefits arising from the purchase of said four-sevenths interest."

In view of the above finding, and of the evidence as discussed above, we think the Yarwoods did not waive their right to avail themselves of the benefit of the Elephant purchase. Upon payment of one-half of the purchase price and

legal interest thereon, either by an accounting between themselves and their co-tenants or otherwise, they are entitled to one-half of the interest purchased,—that is to say, one-half of four-sevenths, or two-sevenths, of the entire Elephant lode, whether lying within the limits of the Legal Tender or of the Elephant,—and, upon such payment being made, their title thereto shall be quieted. It must be taken as settled by the verdict of the jury that the particular vein of ore upon which the co-tenants had been operating within the limits of the Legal Tender is a part of the Elephant lode. That vein of ore is the one real subject of controversy in this action, the purpose of the action under the various issues being to establish the respective rights of the parties therein.

The defendants Yarwood ask that their title may be quieted to a one-half interest in the Legal Tender claim, but, as we conceive the issues, this action in no way assails the Legal Tender claim, except in so far as the Elephant lode, which lies therein, is concerned. If other ore deposits have been discovered to exist within the limits of the Legal Tender, the right of the Legal Tender holders therein is not here in issue. There is, therefore, no occasion for any decree upon that subject. The decree should therefore be confined to the quieting of the title and to the establishment of the respective rights of possession in and to the entire Elephant lode, the respective interests being five-sevenths to the plaintiff company and two-sevenths to the defendants Yarwood.

The cause is remanded, with instructions to the trial court to modify the decree in accordance with this opinion.

REAVIS, C. J., and FULLERTON, WHITE, DUNBAR, MOUNT, and ANDERS, JJ., concur.

[1]FEDERAL OIL CO. v. WESTERN OIL CO. ET AL.

(112 Federal 373. Circuit Court, District of Indiana. Jan. 11, 1902.)

Specific performance of unequal contract never enforced. In an action to enforce specific performance of a contract, any fact showing that the contract is unfair, unjust, and against good conscience will justify the court in refusing such decree, though the contract may be enforceable at law, and there is no sufficient ground for its cancellation.

[2]Unilateral contract is of this class. A lease for the nominal consideration of $1, for the purpose of drilling and operating for oil and gas, —the lessor to receive a certain proportion of the oil and gas obtained,—which does not obligate the lessee to commence or prosecute such operations, and which he may terminate at his pleasure without compensation to the lessor, is unconscionable, and should not be enforced.

The governing principle in gas and oil leases is that the discovery and production of gas or oil is a condition precedent to the existence and continuance of any vested estate in the demised premises.

[3]Fatal delay. Where, under a lease for the purpose of drilling and operating for oil and gas, the only consideration to the lessor is the prospective royalties to arise from exploration and development, and the lessee fails for eight months to commence such development, the agreement is without consideration, and may be abandoned by the lessor.

Agreement to complete wells. Where in a lease of oil lands, the lessee agrees to complete a second well within 90 days after the completion of the first well, but does not agree to complete or even to commence the first well, such agreement as to the second well is no consideration for the contract.

Binding only one party. The court will not decree that one party shall specifically perform a contract which the other party, at his option, may refuse to carry out.

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[1]Affirmed 121 Fed. 674; 22 M. R. —.

[2]Refused on grub stake contract of $50 to go to Alaska and locate claims for want of adequate consideration. *Prince* v. *Lamb*, 20 M. R. 419.

[3]Laches, increase in value and standing by, defeats. *Anderson* v. *Luther Co.* 70 Minn. 23; 72 N. W. 820.

Effect of change of conditions in title and value since the original contract. *Oliver Co.* v. *Clark*, 65 Minn. 277; 68 N. W. 23.

Where, pending appeal, on decree for specific performance, defend-

In Equity.

This is a suit in equity to compel the enforcement of a lease for mining for oil and gas. The bill alleges that the defendants Bradford and wife on February 22, 1901, executed to the complainant a lease as follows: "In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, R. W. Bradford, of Van Buren, Ind., of the first part, hereby grant and guaranty unto the Federal Oil Company, a corporation, of Chicago, state of Illinois, second party, all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil and gas, and to erect and maintain all buildings and structures and lay all pipes necessary for the production and transportation of oil or gas. The first party shall have the one-eighth part of oil produced and saved from said premises, to be delivered in the pipe line with which second party may connect their wells, namely, all that certain lot of land described as follows, to wit: South half of the northwest quarter of section ten, town twenty-five north, range nine east, in county of Grant and state of Indiana, containing eighty acres, more or less. To have and to hold the above-described premises on the following conditions: If gas only is found, in sufficient quantities to transport, second party agrees to pay first party one hundred dollars annually for the product of each and every well so transported, and the first party to have gas free of cost for heating and lighting pur-

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ants converted oil, plaintiffs are entitled to damages. *Southern Co.* v. *Scales*, (Tex. Civ. App.) 69 S. W. 1033.

Specific performance will not be granted after long delay, mines opened and value increased. *Ruff's App.* 117 Pa. 310; 11 Atl. 553.

A vendee of stock who is in arrears for its purchase money cannot after discovery of its enhanced value make a tender such as will authorize him to enforce specific performance. *Diamond State Co.* v. *Todd*, 6 Del. Ch. 163; 14 Atl. 27.

In specific performance the doctrine of laches cannot be invoked by a party out of possession against a party in possession. *Coffee* v. *Emigh*, 15 Colo. 184; 25 Pac. 83.

Cross lode contract enforced. *Id.*

The rule that time is of the essence of the contract is of especial importance in the case of the sale of a mine. If time is alleged to be non-material in such a case the point must be made clear of doubt. *Durant* v. *Comegys*, 3 Idaho, 204; 28 Pac. 425.

Specific performance will not be granted to a buyer on a unilateral contract for purchase of coal lands where his time has expired. *Standiford* v. *Thompson*, 135 Fed. 991.

poses in dwelling house. Second party shall bury all oil and gas lines when same interferes with cultivation, and pay all damage done by reason of operating under this grant. In case no well is commenced within one day from this date, then this grant shall become null and void, unless second party shall thereafter pay at the rate of eight dollars and seventy-five cents ($8.75) for each month such commencement is delayed, in advance. A check to the credit of the first party, mailed to Van Buren, Ind., will be good and sufficient payment for any money falling due on this grant. First party has right to locate roads to and from places of operations. No well shall be drilled nearer to buildings than three hundred feet, unless by agreement and with an understanding between the parties hereto. Second party to erect and maintain gates and keep same closed. Shackle lines shall be high enough for team to pass under. Second well shall be completed ninety days after first well, and a well each ninety days thereafter until seven wells are in. Then rental to cease. The second party shall have the right to use sufficient gas, oil, and water to run all machinery for operating said wells, also the right to remove all its property at any time, and may cancel and annul this contract, or any part thereof at any time. It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, successors, and assigns." This lease was properly acknowledged and was duly recorded on March 4, 1901. The complainant avers performance on its part of all the conditions and terms of the lease; that it has paid the rentals as in the lease provided, which rentals were received and accepted by the lessors until the payment required to be made October 22, 1901; that on October 19, 1901, the complainant mailed to the lessor R. W. Bradford a check for $8.75, as required by the lease, which he received, but refused to accept; that he returned the check to the complainant, stating that he would no longer be bound by the lease; that, disregarding the rights of the complainant, Bradford and wife have attempted to lease, and have placed the Western Oil Company in possession of, the premises; that the Western Oil Company has wrongfully entered upon the demised premises, and is wrongfully drilling thereon for gas and oil; that on November 14, 1901, the complainant moved material onto said premises for the purpose of erecting a structure to be used in drilling for gas and oil, and on November 16, 1901, the Western Oil Company wrongfully removed said material from the leased premises, and Bradford acquiesced in and approved of such removal; that the wrongful acts of the defendants cast a cloud upon the complainant's leasehold title; and that if they are not restrained the defendants will do great and irreparable injury to the complainant's rights. The complainant prays for an injunction restraining the

defendants from setting up any claim or right adverse to that claimed by the complainant, and from entering upon the demised premises; that the complainant's title be quieted; and that the defendants be enjoined from in any manner asserting any right or title adverse or hostile to the leasehold title of the complainant. To this bill the defendants have filed their joint and several demurrer.

JOHN L. GRIFFITHS and ELMER H. ADAMS, for complainant.

CABLE & PARMENTER, GAVIN & DAVIS, and CHARLES & BROWN, for defendants.

BAKER, District Judge (after stating the facts as above). The defendants contend that the bill cannot be maintained—First, because the complainant is not bound to drill for gas or oil, and is not bound to pay for failure so to do, and that at the end of any month it may cease to pay rent, and no right of action therefor would exist in favor of the lessors for such default; second, because the complainant has the right at any time to remove all its property from the demised premises, and to annul and put an end to the lease.

The only consideration yielded at the time of making the lease was $1 in hand paid by the complainant to the lessors. As will be seen later, there was no binding promissory consideration on the part of the complainant for the execution of the lease. The bill, which is verified, alleges that the leasehold interest claimed to have been acquired exceeds $2,000 in value. The cash payment, if actually made, was merely nominal, and it is quite apparent from a consideration of the terms of the whole lease that the lessors would not have executed it for any such paltry consideration. If there was no further consideration which the lessee was bound to yield to the lessors, a court of equity would be bound to refuse the enforcement of the lease. The consideration would be so

trifling, compared with the value of the leasehold interest, as to shock the moral sense. An agreement may be enforceable at law, and there may be no sufficient ground for its cancellation in equity; and yet, upon a fair and just consideration of the attendant and collateral circumstances, the court may be satisfied that the contract is unconscionable, and refuse to decree its performance. Before granting a decree the court must be satisfied not only of the existence of a valid contract, free from fraud and enforceable at law, but also of its fairness and of its harmony with equity and good conscience; and any fact showing that the contract is unfair, unjust, and against good conscience will justify the court in refusing to decree its performance. Such, manifestly, is the character of the lease in question.

Oil leases stand upon quite different grounds from leases of other immovable property. The governing principle in gas and oil leases of the character in question is that the discovery and production of gas or oil is a condition precedent to the existence and continuance of any vested estate in the demised premises. Where, as in this case, the only consideration is prospective royalties to arise from exploration and development, failure to promptly explore and develop the demised premises renders the agreement *nudum pactum,* and works a forfeiture of the lease, for it is the essence of such a lease that the work of exploration shall be commenced and prosecuted with promptness. The smaller the tract of land demised, the more inperative is the need of prompt exploration and development, because the lessor is entitled to his royalty as promptly as it can be had, and delay endangers the drainage of the oil and gas from the demised premises through wells in its immediate vicinity. Leases of coal, stone, and other like materials are corporeal hereditaments, and constitute an essential part of the land itself, and are capable of present, absolute grant, while oil and gas are of a fugitive and volatile nature, a grant of either of which creates only

an inchoate right, which will become absolute only upon its reduction to possession. A lease to mine for oil or gas is a mere incorporeal right to be exercised in the land of another. It is a *profit à prendre,* which may be held separate and apart from the possession of the land itself. Except to the extent of $1, the lessee has yielded no consideration for the lease; nor is it bound by any enforceable promise or covenant, for the breach of which the lessors would have a right of action to compel the payment or yielding of any further consideration whatever. The lessors' right to a portion of the oil can only arise when it has been produced and saved on the premises. The lessors have a right to a royalty for gas only when it is found in sufficient quantities to transport, and then only for the product of each well when actually transported. The complainant, it is true, agrees that the second well shall be completed within 90 days after the first well, and that a well shall be drilled each 90 days thereafter until seven wells are sunk; but the complainant does not agree that it will ever drill the first well. Doubtless the lessors expected the exploration and development of the demised premises to commence at once, but the language of the lease is that, "in case no well is commenced within one day from this date, then this grant shall become null and void," unless the complainant should thereafter pay in advance at the rate of $8.75 for each month such commencement is delayed. Thus it is seen that the complainant is under no obligation enforceable at law ever to commence the drilling of the first well, and it is under no obligation to pay for failure to commence or complete the sinking of the first well. The provision that the second well shall be completed within 90 days after the first well is sunk is not enforceable at law, because the complainant is not bound ever to commence or complete the first well. The complainant is under no obligation to pay the monthly rental of $8.75. The lessors could maintain no action to recover the same if the complainant should

refuse to continue payment. Such a lease is without consideration, and must be held a *nudum pactum* and void. A lease so unfair, inequitable, and against good conscience no court ought to enforce.

And for another reason the court cannot enforce this lease: The lease expressly provides that the complainant shall have the right to remove all its property from the demised premises at any time, and may cancel and annul this contract, or any part thereof, at any time. It is a well-settled rule of law that a lease which is determinable at the will of one party is equally determinable at the will of the other party. *Knight* v. *Iron Co.* 47 Ind. 105, 17 Am. Rep. 692.

And for a still further reason the court must refuse to enforce this lease: The court will not decree that one party shall specifically perform a contract which the other party, at its option, may refuse to carry out. It is of the essence of a decree that it should be mutually binding and conclusive on both parties. It would be an idle formality for the court to enter a decree against the defendants in this case, for the reason that the complainant has the right to render the decree ineffective at any moment that it pleases. *Marble Co.* v. *Ripley,* 10 Wall. 339, 359, 19 L. Ed. 955.

For these reasons the demurrer is sustained and the bill dismissed for want of equity, at the costs of the complainant, and the temporary restraining order heretofore granted is dissolved.

SNOW v. NELSON.

(113 Federal 353. Circuit Court, District of Nevada. January 20, 1902.)

Time of first payment not specified. Where the written memorandum of an oral contract of sale of mining property is not certain as to the time when the first payment is to be made, it is insufficient to take the contract out of the statute of frauds, time being of the essence of contracts relating to such properties.

Written contract changed orally becomes oral. Where a written memorandum is made of an oral contract for the sale of real property, and the terms of the contract are afterwards changed by oral agreement of the parties, the whole thereupon becomes an oral contract.

[1]**Option to purchase. When not assignable.** Where an option, not assignable in terms, to purchase mining property, is given to one who represents himself to be the agent and acting for a party known to the owner, and to whom he desires to sell, such option is not assignable.

[2]**Right to withdraw option.** Where a mine owner gives an option to purchase his mines, he may withdraw such option at any time before its acceptance.

TRENMOR COFFIN and JAMES A. WILLIAMS, for plaintiff.

M. S. BONNIFIELD and WM. H. KING, for defendant.

HAWLEY, District Judge (orally). This is a suit for the specific enforcement of a contract for the sale of certain copper mining claims situate in Humboldt county, Nev. It is, among other things, alleged in the amended bill of com-

[1] *National Co.* v. *Teel*, 22 M. R. —.

[2] Where only one party is bound there is no consideration. *Eclipse Co.* v. *South Penn Co.* 20 M. R. 234.

An option which shows a consideration is valid. And where all its terms have been performed it is taken out of the Statute of Frauds. *Walker* v. *Bamberger*, 17 Utah 239; 54 Pac. 108.

A lessor may recognize an assignee of a lease and at the same time refuse to recognize the assignment of the option where the option was a mere personal license. *Myers* v. *Stone*, — Ia. —; 102 N. W. 507.

plaint: That on May 15, 1899, one W. H. Edwards entered into an oral or verbal agreement with the defendant J. A. Nelson for the purchase of certain mining claims for the sum of $12,000—$200 to be paid by Edwards to Nelson upon the execution and delivery by Nelson of a bond and lease for said claims to Edwards and upon the execution and delivery by Nelson of a deed for the claims, delivered into escrow, $800 six months from said date, and $11,000 within fifteen months from said date. That said Edwards agreed to do the unfinished location work on said claims as provided by the laws of the state of Nevada. That afterward Nelson agreed to do said unfinished location work for $175. That a deed was to be executed and placed in escrow and delivered to Edwards or his assigns upon the final payment of said $12,000. That pursuant to said agreement defendant Nelson made, executed, and delivered to Edwards the following memorandum thereof, to wit:

"Jackson Creek, Humboldt County, Nev., May 15th, 1899.

"This is to certify that I, J. A. Nelson, do hereby agree to lease and bond to W. H. Edwards the following described mining claims: The 'Olympia,' the 'Humboldt,' the 'Tiger,' the 'Alta,' the 'Grand,' the 'Deer Spring,' the 'Lucky,' the 'Crown Point,' all situated in the Jackson Mountains, on the north side of Jackson Creek canyon; also three claims in Black Rock Mountains, namely, the 'Copper Nugget,' the 'Crescent,' the 'Black Jack,' all three situated in Humboldt county, north of Battle creek,—for the sum of $12,000.00; two hundred dollars cash when the lease and bond is accepted and the deed is put in escrow, eight hundred dollars in six months from date, the balance within fifteen months from date. All location work to be done by J. A. Nelson, and recorded with the records at the recorder's office, in Winnemucca, Nevada; the unfinished location work to be done by me, W. H. Edwards, providing the company accepts the proposition in proper time.

"J. A. Nelson.

"Witness: P. M. O'Brien."

That the proof of the acknowledgment of said memorandum was thereafter duly made, and the said memorandum

was on the 21st day of May duly recorded in the recorder's office of Humboldt county. That the proviso contained in the last two lines of said agreement referred to James A. Williams, Charles Dupont, and J. W. Langley, said Edwards' associates at Salt Lake City, and furnishing him money for expenses on a certain mining venture in the state of Nevada. That the said associates accepted the proposition immediately, and confirmed the making of the said contract by Edwards. That Williams, Dupont and Langley duly assigned and released to the plaintiff all their right, title, and interest in said contract and in all the property therein described before the bringing of this suit, and the plaintiff is now the owner and holder thereof. The written memorandum is not the contract, but it is evidence of it. No lease, bond, or deed was ever executed by the defendant.

Is the alleged contract enforceable? Is the written memorandum signed by Nelson sufficient to take the case out of the statute of frauds of this state (sections 2696, 2700, Cutting's Comp. Ann. Laws)? The law requires that the note or memorandum must contain the essentials of the contract as completed. Browne, St. Frauds, § 371a; Pom. Cont. § 86. It must contain the terms of the contract, and must be so reasonable, certain, and definite in itself that the contract can be made out without requiring additional proof in parol. 1 Reed, St. Frauds, § 392. It must "contain such words as will enable the court, without danger of mistake, to declare the meaning of the parties. It must obviate the necessity of going to oral testimony and relying on treacherous memory as to what the contract itself was." *Scarritt* v. *Episcopal Church,* 7 Mo. App. 174, 178. It must appear that there was a "clear accession on both sides to one and the same set of terms," that the minds of the parties met at every point, and that nothing was left open for future arrangement. *Langellier* v. *Schaefer,* 36 Minn. 361, 31 N. W. 690; *Krum* v. *Chamberlain* 57 Neb. 220, 77 N. W. 665. The general

proposition as to the form of such memoranda is expressed in Wood, Frauds, § 345, as follows:

"If the memorandum contains all the essential elements of a contract, the form in which it is written is of no account, as any instrument, however informal, or bunglingly constructed, which describes the property, the price to be paid therefor, if the price has been agreed upon, the parties, and the essential terms of the agreement, either by its own terms or by reference to other writings, so that parol evidence is not necessary to establish or explain it, is as valid and binding as the most formal instrument which could be constructed. The statute only contemplates that such a note or memorandum should be made as men in the hurry of business may be supposed to be likely to make; but, nevertheless, of such a definite character in all the essentials of the contract that the intention of the parties, their names, and relation to each other under the contract, can be gathered from the memorandum itself, leaving nothing to be supplied by parol. But a memorandum which is deficient in any of these respects is insufficient to take the contract out of the statute."

See, also, Browne, St. Frauds (4th Ed.) §§ 345a, 371, 371a.

The alleged oral contract in the present case relates to an option for the purchase of mining property, whereby the party obtaining the option seeks to secure the first privilege of purchasing the same within a given time upon complying with certain terms embodied therein. There are a number of people, generally known and designated as "promoters," who travel through the mining regions for the purpose of obtaining such options from the owners of a mine, and "trust to luck" to be able to market the same in the money centers of the world. Others often represent moneyed men who have furnished sufficient means to enable their agents to obtain such options, agreeing to furnish the money for the purchase, provided an examination and inspection of the property prove it to be of sufficient value to warrant the purchase. In the very nature of such cases the courts ought always, in order to prevent fraud, deception, or misstatement, where the

contract is not in writing, to require that the note or memorandum which is relied upon to take the contract out of the statute of frauds should be reasonably clear, definite, and certain. The written memorandum contains several of the essentials required by the statute. It describes the property; the price agreed upon to be paid therefor. It is signed by the party to be charged thereby. But the time when the first payment is to be made is not clear and certain. The date is not fixed. It might, however, be held that the law would imply that it should be within a reasonable time. If so, the mere failure to name the date would not of itself prevent the enforcement. The authorities upon this point are by no means uniform. The discrepancies which exist may, to some extent, be attributable to the different kinds of contracts. The question is elaborately discussed in Pom. Cont. §§ 374, 387, 388, one group of decisions holding that, with reference to unilateral contracts, time is, and necessarily must be, essential in the strict sense of the term; while another group holds that time is merely material, but not absolutely essential. The authorities generally declare that, where mines or mining properties are the subject of the contract, time is of the essence. In 2 Lindl. Mines, p. 1111, § 859, the author says:

"The necessity for a strict adherence to the rule that in all contracts for the purchase of mines time is of the essence is apparent. Were the rule to be relaxed, and the owner of the mine executing the option or contract of sale, which is ordinarily unilateral, and not mutual, to be compelled to resort to the courts to terminate the equities of the proposed vendor, or remain in a state of uncertainty awaiting the lapse of an indefinite period called 'reasonable time,' his property would remain practically unmarketable. The holder of the option would be given unreasonable opportunities to speculate without the fear of incurring any loss. The law would place him in a position to interdict a sale to any one else, or to exact an unearned consideration for a surrender of phantom equities."

The written memorandum is in many other respects so uncertain and indefinite in its terms as to require oral testimony

to explain it in order to enable the court, "without danger of mistake," to judicially determine its true intent and meaning. In Pom. Cont. § 71, the author, speaking of the statute of frauds, says:

> "The controlling motive of the statute is one of expediency and convenience, and this motive has always been kept in view by the ablest courts in their work of interpretation. As its primary object is to prevent mistakes, frauds, and perjuries by substituting written for oral evidence in the most important classes of contracts, the courts of equity have established the principle, which they apply under various circumstances, that it shall not be used as an instrument for the accomplishment of fraudulent purposes. Designed to prevent fraud, it shall not be permitted to work fraud. This principle lies at the basis of the doctrine concerning part performance, but is also enforced wherever it is necessary to secure equitable results."

Acting under these general principles, the courts have held that, if the plaintiff's conduct in obtaining an option or contract, or in acting under it, has been unconscientious, inequitable, or characterized by bad faith, a court of equity will refuse him the remedy of a specific performance. Pom. Eq. Jur. § 400.

Specific performance is not a matter of absolute right, but rests entirely in judicial discretion, to be exercised according to the settled principles of equity so as to reach the ends of justice. *Newton* v. *Wooley* (C. C.) 105 Fed. 541, 544, and authorities there cited. The memorandum signed by Nelson agrees "to lease and bond" to Edwards the mining claims therein described, "providing the company accepts the proposition in proper time." But this last clause is claimed by plaintiff to have been inserted for the purpose and intention that it should be applied only to the assessment work that was to be done upon the mines, and has no application to the agreement of sale. By a literal reading of the last clause it would seem to apply only to the unfinished assessment work to be done in order to secure a title to the mines, but Edwards

was to do this work "providing the company accepts the proposition in proper time." There is no pretense in the pleadings or evidence that Edwards did any of the location work. On the contrary, the complaint alleges and the proofs show that after the execution of the written memorandum the agreement as to this work was orally changed, and that Nelson agreed to do said unfinished work "at an agreed price of $175." The proofs show that neither Edwards nor the plaintiff ever paid or tendered to Nelson the sum of $175, or any sum of money whatever, for location work. It is evident that it was essential that the location work should be done either by Nelson or Edwards within the time allowed by law. The proofs show that Nelson had, prior to that time, done the location work on some, but not all, of the claims, and that upon several of the claims the assessment work was never done, and they have since been relocated by other parties. The testimony shows that Williams, Dupont, and Langley, who it is alleged were Edwards' associates, "furnishing him money for expenses," never accepted the proposition in "proper time," or at any time, but as a matter of fact declined to act in the premises.

Conceding that the last clause in the memorandum only applied to the location work, the question remains whether it was not an essential part of the memorandum? Would Nelson have signed it if that clause had been left out? If the bars are thrown down, and the court compelled to examine all the oral testimony, it clearly appears that he would not. But of that more anon. Does not the fact alleged in the complaint that Nelson and Edwards afterwards orally agreed to change its terms in such a manner as to depart from the writing signed by Nelson reduce the agreement between the parties to the level of a verbal contract, which cannot be enforced? In Bish. Cont. § 164, the author says:

"A contract partly in writing and partly oral is, in legal effect,

an oral contract. It occurs where an incomplete writing, or one expressing only a part of what is meant, is by oral words rounded into the full contract; or where there is first a written contract, and afterward it is changed orally."

In the last line of the memorandum it speaks of the "company." What company? The name of the company is not stated. Nor are the names of the individuals comprising the company disclosed. It is difficult to separate one part of the memorandum from the other. There was but one memorandum. It must be construed in its entirety. The last clause sheds some light on the whole transaction. It indicates that Edwards was not acting for himself alone. It requires oral testimony to show who the company was, and the testimony upon this point is nearly as uncertain as the written note or memorandum. On one side the testimony is to the effect that Williams, Dupont, and Langley were to be equally interested with Edwards; on the other side it is claimed that it was Judge Burton's contract because he put up the money to pay Edwards' expenses. There is a decided conflict in the evidence upon all material points. Was the contract, if such it can be called, assignable? The weight and reliability of the oral testimony shows that Edwards misrepresented the facts and concealed the truth as to the parties for whom he was acting, and thereby induced Nelson to sign the memorandum and enter into a contract. He represented that he was acting for McCornick & Co., bankers at Salt Lake, whom Nelson knew to be responsible, and possessed of large means. Nelson testified that he owned other mining claims in the vicinity of those mentioned in the written memorandum, and that he wanted to dispose of those mentioned to parties who had the means to work and would develop the same, believing that it would increase the value of his other claims; that he stated this fact to Edwards, and that Edwards then made the statement that he was representing McCornick & Co.; that Nelson believed such statement

to be true, and would not have signed the momorandum if he had not believed these representations made by Edwards. The law is well settled that contracts of this character, entered into by one party upon the representations of the other as to the responsibility and solvency of the other party or parties, are not assignable. 2 Am. & Eng. Enc. Law, 1037, (2d Ed.) and authorities there cited. In *Arkansas V. S. Co.* v. *Belden M. Co.*, 127 U. S. 379, the court said:

> "Every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.' *Humble* v. *Hunter*, 12 Q. B. 310, 317; *Winchester* v. *Howard*, 97 Mass. 303, 305, 93 Am. Dec. 93; *Ice Co.* v. *Potter*, 123 Mass. 28, 25 Am. Rep. 9; *King* v. *Batterson*, 13 R. I. 117, 120, 43 Am. Rep. 13; *Lansden* v. *McCarthy*, 45 Mo. 106. The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise: 'Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.' Pol. Cont. (4th Ed.) 425."

Section 3100, Cutting's Comp. Ann. Laws, relied upon by plaintiff, does not change the rule as to the assignability of such contracts. The statute does not enlarge the right of assignment, nor authorize it "in cases where it did not before exist." 7 Enc. Pl. & Prac. 757, and authorities there cited; Pom. Rem. & Rem. Rights, 145; *Wheeler* v. *Walton Co.* (C. C.) 64 Fed. 664, 667. The option had no binding force until it was accepted in compliance with its terms. Pom. Cont. §§ 59, 60; *Hackley* v. *Oakford*, 39 C. C. A. 284, 98 Fed. 781; *Weaver* v. *Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Erickson* v. *Wallace*, 45 Kan. 430, 432, 25 Pac. 898. The oral testimony satisfactorily shows that Nelson, after he signed the memorandum, upon learning that Ed-

wards had misrepresented the facts as to McCornick & Co. being the parties for whom he was acting, and before there was any acceptance by the company, repudiated the contract, and declined to have anything more to do with Edwards, and, among other things, accused Edwards of having deceived him and lied to him, etc. Nelson, under the facts of this case, had the unquestioned right, before any valid acceptance, to withdraw the offer. In Pom. Cont. § 61, the author said:

"As the offer is not in any sense binding, the person who makes it may, at any time before a valid acceptance has changed its character, withdraw it, and thus put an end to the negotiation. He can do this whatever be its form, whether promissory or not, and without any reason except his own will. Although the person to whom the offer was made may have intended, and even attempted, to accept, still if the acceptance was for any reason imperfect, and not binding, so that no contract was concluded, the power of withdrawal remains unaffected."

The record shows that the plaintiff bought the interest of the parties under whom he claims with full knowledge of all the facts and of all the equities in the premises, and is, of course, bound by them.

With reference to the question of part performance, relied upon by plaintiff, it is enough to say that, in my opinion, there is no sufficient evidence of any such part performance by plaintiff, or of any of the parties under whom he claims, as would justify this court to decree a specific performance on this ground.

The views I have expressed are conclusive that plaintiff has failed to make out such a case as entitles him to any decree. It is therefore unnecessary to consider any of the other questions discussed by counsel.

The defendant is entitled to a judgment for his costs. Let a decree be entered accordingly.

MARTIN W. WAGNER ET AL. v. LEWIS E. MALLORY ET AL.

(169 New York 501; 62 N. E. 584. Court of Appeals. January 28, 1902.)

[1]**Oil being a fluid,** is governed to some extent by rulings applicable to salt and mineral waters.

[2]**A lessee has no property in the oil** until it is brought to surface and reduced to possession.

Personal property. By statute in New York oil wells operated by lease or license are personal property for all purposes except taxation.

A deed purporting to convey real estate does not convey an oil lease, such lease being personal property and it is not covered by the phrase "all the lands . . . in which they have an interest." *Wagner* v. *Mallory*, 41 App. Div. 126. Affirmed.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Martin W. Wagner and others against Lewis E. Mallory and others. From a judgment of the Appellate Division (58 N. Y. Supp. 526) affirming a judgment for defendants, plaintiffs appeal. Affirmed.

[1]*McClay* v. *Western Pa. Co.* 21 M. R. 760.

Peculiarity of oil and gas leases. Time of the essence of the contract. Construed most strongly in favor of the lessor contrary to ordinary and other mining leases. *Huggins* v. *Daley*, 20 M. R. 377. *Rawlings* v. *Armel*, 70 Kans. 778; 79 Pac. 683.

Construction of a contract between an oil company and a gas company by which the gas company were to turn over any oil well they opened up to the oil company, and vice versa, with the holding that when the oil company struck in a certain well, gas in paying quantities, they were bound to turn it over to the gas company and had no right to keep on sinking to reach a deposit of oil supposed to exist in a lower stratum. *Carnegie N. G. Co.* v. *S. Penn Oil Co.* — W. Va. —; 49 S. E. 548.

That upon the election of the gas company to take such well the option became an executory contract and that the Court would preserve the *status quo* of the property by injunction. *Id.*

[2]*Steelsmith* v. *Gartlan*, 19 M. R. 315; *Rawlings* v. *Armel*, *supra*.

A. WENTWORTH, for appellants.

F. B. CHURCH, for respondents.

HAIGHT, J. This action was brought to enjoin the defendants from appropriating the oil produced upon the premises described in the complaint, and for an accounting, etc.

There is no controversy with reference to the facts. The history of the title to the lands in question is of considerable length, and is fully set forth in the findings of the referee. We shall here state only so much of it as presents the question to be determined.

In the year 1887 one Job Moses died, leaving a last will and testament, which was duly admitted to probate in Cattaraugus county. At the time of his death he was the owner of an oil lease, executed on the 2d day of October, 1877, upon the lands described in the complaint, for a term of 40 years. At this time one John S. Robinson was the owner of the lands,—subject, however, to the rights reserved by this lease. The defendants Mallory, Rathbone, and Tait have succeeded to the title of Robinson, and the plaintiffs claim to be the owners of the lease under a deed executed by the executors and devisees under the will of Job Moses. That deed bears date the 2d day of October, 1888, and is in the usual form, specifically describing 20 parcels of land in the town of Carrolton, Cattaraugus county, and 5 parcels in the town of Red House, in that county, none of which includes the lands owned by Robinson or these defendants. It, however, concludes with the following: "It is the intent hereof to convey to the parties of the second part all the lands and premises owned by the parties of the first part, or in which they have an interest, lying or being in said town of Carrolton and the said town of Red House, whether the same are hereinbefore particularly described or not." The lands of Robinson, upon which the lease was outstanding, were located in the

town of Carrolton, and therefore it is contended on behalf of the plaintiffs that the leasehold interest owned by the testator at the time of his death passed to them under this provision of the deed. Subsequently the defendants Mallory, Rathbone, and Tait caused an oil well to be drilled upon the premises, which resulted in the discovery of oil, which they ever since have been producing therefrom and appropriating to their own use.

In order to determine the true intent and meaning of the provision in the deed to the plaintiffs alluded to, it becomes important to examine more fully the provisions of the lease. By its terms the party of the first part grants, demises, and lets to the parties of the second part, their executors, administrators, and assigns, for the sole and only purpose of mining and excavating for oil, giving to them the exclusive right and privilege of so mining and excavating oil for a period of 40 years; the parties of the second part covenanting to deliver to the party of the first part one-eighth part of the oil pumped and raised from the premises. It will be observed that there is, by the terms of the lease, no grant of the oil as it exists in the earth, so that there is no passing of the title to the oil as it exists in its natural state, but that the right is limited to the mining and excavating, or the pumping and raising, of the oil from the premises. It is a right to produce or extract the oil from the earth, yielding one-eighth thereof to the landlord. What was this right? Was it real estate or personal property? It is said that leases of this character are incorporeal hereditaments, and that petroleum oil is a mineral, and is a part of the realty like coal, iron and copper. It is true it is a mineral substance; but it widely differs from the minerals mentioned, which are solids, having a fixed location in the earth, like the rock itself. Petroleum oil is a fluid found in the porous sandrock of the earth. In some instances it doubtless exists in pools, but where are the pools located? They may be under the lands in which the well is drilled.

They may be in the abutting or remote lands, and may drain into the wells through seams or crevices in the rock, and then be extracted from the earth and reduced to possession by the operator. In this respect oil resembles water as it exists in the earth—especially salt and mineral waters, which have a market value—and is largely governed by the same rule of law. It consequently was held at a very early day in the history of the petroleum oil production that a man could not be restrained by his abutting neighbor from boring for oil upon his own premises, although he located his well within a few feet of the line, and would necessarily drain the oil from his neighbor's land, if any existed therein. We consequently are of the opionion that no title to the oil vested in the lessee until it had been taken from the ground and reduced to possession. *Duffield* v. *Hue,* 136 Pa. 602, 607, 20 Atl. 526; *Westmoreland Gas Co.* v. *De Witt,* 130 Pa. 235, 249, 18 Atl. 724; *Brown* v. *Vandergrift,* 80 Pa. 142; *Union Petroleum Co.* v. *Bliven Petroleum Co.* 72 Pa. 173; *Funk* v. *Haldeman,* 53 Pa. 229; *Dark* v. *Johnson,* 55 Pa. 164, 168, 93 Am. Dec. 732; *Appeal of Thompson,* 101 Pa. 225, 232; *Shepherd* v. *Oil Co.* 38 Hun, 37; *Goodale* v. *Tuttle,* 29 N. Y. 459, 466.

Again, by chapter 372 of the Laws of 1883 the legislature enacted that:

"All oil wells and all fixtures connected therewith, situate on lands leased for oil purposes and oil interests, and rights held under and by virtue of any lease or contract or other right or license to operate for or produce petroleum oil, shall be deemed personal property for all purposes except taxation, but nothing herein contained shall affect the laws now in force relating to taxation."

Here we have an express provision of the statute making oil wells fixtures, and oil interests located on leased lands personal property. It is quite true that the legislature had no power to destroy vested interests in real property, and that

this act was passed after the execution of the lease in question; but the legislature had the power to determine and define the character of property, and specify whether it should be regarded in the future as real or personal. This statute was in force when Moses died, and when his executors and devisees conveyed to the plaintiffs. The act then defined the interests of Moses, or those of his legatees and devisees, under the lease, as personal property; and they must be presumed to have executed the deed having in mind this statute.

The provisions of the deed under which it is contended that the leasehold interests outstanding upon the defendants' premises were conveyed to the plaintiffs announce an intent to convey to them all the lands and premises owned by the parties of the first part, or in which they have an interest. In other words, the intent was to convey an interest in real estate, and not in personal property.

We think the provision does not cover the interest in the lease, and therefore that the judgment should be affirmed, with costs.

PARKER, CH. J., GRAY, O'BRIEN, BARTLETT, CULLEN, and WERNER, JJ., concur. *Judgment affirmed.*

JAMES DEENEY ET AL. V. MINERAL CREEK MILLING CO.

(11 New Mexico 279; 67 Pac. 724. Supreme Court. February 1, 1902.)

Amendment in adverse claim suit. An amendment in a suit supporting an adverse claim may be allowed although the statutory thirty days for filing complaint have elapsed.

An ordinary declaration in ejectment is sufficient, under sections 2290, 2291, Comp. Laws, 1897, to present all the questions involved between an applicant for patent for a mining claim and an adverse claimant.

[1]**Necessity of posting location notice.** In New Mexico a preliminary or discovery notice of location of a mining claim is unknown to our laws, and a locator, as against a subsequent locator who enters peaceably, must post such a notice as, when a copy thereof is recorded, the record will meet the requirements of section 2324 of the Revised Statutes of the United States.

The same as to staking claim. In instructing the jury, the court omitted to mention the requirements of Sess. Laws 1889, c. 25, § 2, in force when the location was made, as to manner of marking the boundaries of the claim on the ground. *Held* error.

Entry void, made pending adverse. A receiver's receipt issued to a mining applicant during the pendency in the court of an action brought in support of an adverse claim, in pursuance of section 2326 of the Revised Statutes of the United States, is issued without jurisdiction and is void.

Error to District Court, Socorro County; before Justice H. B. HAMILTON.

[1]Location notice was put in a tin can on pile of rocks and the corners of the claim were marked by similar mounds of rocks; held a good location. *Gird* v. *California Oil Co.* 18 M. R. 45.

Essentials of location are discovery, notice, location, staking and record. *Marshall* v. *Harney Peak Co.* 1 So. Dak. 350; 47 N. W. 290.

The notice need not refer to natural objects or permanent monuments—that is required of the record only. *Poujade* v. *Ryan*, 21 Nev. 449; 33 Pac. 660. *Brady* v. *Husby*, 21 Nev. 453; 33 Pac. 801.

Posting notice on a single stake on the claim not a sufficient location. *Doe* v *Waterloo Co.* 18 M. R. 265.

The place of posting notice is the initial point from which to claim length and width. *Copper Globe Co.* v. *Allmann*, 21 M. R. 296.

Must be distinctly marked on the ground. Proof of record

Action by the Mineral Creek Milling Company against James Deeney and others. Judgment for plaintiff. Defendants bring error. Reversed.

A. H. HARLEE and T. S. HEFLIN, for plaintiffs in error.

FREEMAN & CAMERON, for defendant in error.

PARKER, J. 1. The first point presented is as to the sufficiency of the declaration filed by contestant. An ordinary declaration in ejectment was filed within the required time, to which was filed the ordinary plea of not guilty. No mention was made in the declaration or plea of any of the land-office proceedings. Long after the expiration of the 30 days following the filing of the adverse claim, contestant filed an amended declaration, setting up the land-office proceedings, and other facts concerning its right to possession of the premises in controversy. Applicants moved to strike this amended declaration from the files, for the reason that a new cause of action was thereby presented, which motion was denied. The proposition was again presented to the trial court by a motion in arrest of judgment, which motion was overruled, and applicants assign error thereon. It is apparent that the questions presented in actions of this kind are much broader than, and in many particulars different from, those presented in an ordinary action of ejectment. The question presented is as to who has the prior right to purchase the fee from the government. *Bennett* v. *Harkrader,* 158 U. S. 441, 447, 39 L. Ed. 1046. The suit is but a continuation of the

"Notice" good without producing the original posted on the claim. *Willeford* v. *Bell.* (Cal.) 49 Pac. 6.

Posting notice without staking does not make a valid location. *Malececk* v. *Tinsley,* 73 Ark. 610; 85 S. W. 81.

Failure to record within ninety days does not forfeit the locator's rights under the Nevada Statute. *Zerres* v. *Vanina,* 134 Fed. 610.

proceedings in the land office to have a determination as to which of the contesting parties is entitled to the patent. *Wolverton* v. *Nichols,* 119 U. S. 485, 488, 30 L. Ed. 474; *Rutter* v. *Mining Co.* (C. C.) 75 Fed. 37. The contestant must show every fact which would entitle him to patent, except those acts necessary to initiate and prosecute an application for patent in the land office. *Schultz* v. *Allyn,* (Ariz.) 48 Pac. 960. And the contestant must prove the filing of his adverse claim in the land office, and the institution of his suit in proper time, or he cannot recover. *Mattingly* v. *Lewisohn,* 8 Mont. 259, 19 Pac. 310. The original declaration filed by contestant, as before stated, was a declaration in ejectment, in ordinary form, and made no mention whatever of either the application for patent by applicants, or the filing of an adverse claim by contestant. The plea was a plea of not guilty, and it also failed to mention any of the land-office proceedings. Applicants urge that the declaration failing to make allegation of these facts, which were a necessary part of the contestant's case, it was error to allow an amendment of the same, bringing in these allegations, after the expiration of the 30 days within which suit must be brought in support of an adverse claim. But it is to be observed that the act of congress authorizing the bringing of these actions nowhere makes mention of any form of action. Any action, appropriate in form, according to the law of the particular state or territory, may be employed. *Perego* v. *Dodge,* 163 U. S. 160, 41 L. Ed. 113; Lindl. Mines, § 754. Our statute provides in express terms that an action of ejectment may be brought in support of an adverse claim in all cases, whether plaintiff is in or out of possession, and provides for the rendition of a special verdict by the jury to define the respective rights of the parties in the premises. Comp. Laws 1897, §§ 2290, 2291. When these two sections were enacted, as now, the statute provided that it should be sufficient for the plaintiff in ejectment to declare that on some

day named he was entitled to the possession of the premises, and that afterwards, on a day named, the defendant entered, and withholds the possession. Comp. Laws 1897, § 3164.

The plaintiff may show any fact which establishes his right to the possession. Comp. Laws 1897, § 3168. The defendant, under the plea of not guilty, may show any fact to establish that the plaintiff is not entitled to possession. Comp. Laws 1897, § 3165. It seems, therefore, in view of the foregoing statutes, that the legislature has seen fit to declare that what might otherwise be well considered insufficient as a declaration or complaint, in cases of this kind may be employed for that purpose, and shall be sufficient. It could not be that the legislature should intend to provide the form of action to be employed, and not also intend that the same should be adequate and complete. We are aware that more specific allegations are required by the current of authority. Lindl. Mines, §§ 754, 755. But we are not aware of any other statute showing a specific intent to provide a given remedy, as is the case here. We therefore hold that the original declaration filed in this case was sufficient. This conclusion obviates the remaining question on the pleadings, for, if the original declaration was sufficient, it was not reversible error to allow it to be amended to set up specifically the land-office proceedings.

2. The next point presented is of serious and far-reaching importance. It involves the question of the extent of the locator's rights after discovery of mineral, and prior to the completion of his location. On July 2, 1895, contestant posted on the premises in controversy the following notice:

"Location Notice. The Gold Eagle lode discovered by the Mineral Creek Milling Company May 2nd, 1895, claim 750 feet easterly and 750 feet westerly from discovery. The Mineral Creek Milling Company, by L. W. Tatum, Agent."

The court instructed the jury as follows: "(9) The law

requires that the notice shall be filed for record and recorded within ninety days after the notice is posted. Such claim so recorded shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. When a citizen goes upon the public domain to locate a mining claim, the first notice which he posts may be an incomplete and imperfect notice, and not such a notice as the law would require him to have filed for record. Still, although the first notice posted at the time of discovery may be imperfect, yet if a person so discovering and posting said notice will thereafter retain possession, and with diligence prosecute his work, sink his shaft, and mark his boundaries, and will within the ninety days after his first discovery have his claim surveyed, and fully and correctly described by a notice properly made, and have such notice posted and recorded, then the fact that his first or discovery notice was imperfect under the law will not invalidate his location. If the first notice was of sufficient certainty to define the extent and nature of his claim, so as to advise the public or any person reading the notice of his possession and the extent of his location, it would be sufficient to protect his possession, as against any one attempting to intrude upon his possession." Our statute provides:

"Sec. 2286. Any person or persons desiring to locate a mining claim upon a vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposit, must distinctly mark the location on the ground so that its boundaries may be readily traced, and post in some conspicuous place on such location, a notice in writing stating therein the name or names of the locator or locators, his or their intention to locate the mining claim, giving a description thereof by reference to some natural object or permanent monument as will identify the claims; and also within three months after posting such notice, cause to be recorded a copy thereof in the office of the recorder of the county in which the notice is posted. And provided, no other record of such notice shall be necessary."

By the acts of congress, no notice of any character is required to be posted upon a mining claim; neither is any required to be recorded. *Haws* v. *Mining Co.* 160 U. S. 303; Lindl. Mines, §§ 350, 379, and authorities cited. But in all the mining states and territories the posting of a notice of claim, and later a record in some form, is required by statute or local regulation. This posting of notice of claim is to be held to be the real inception of the right of the locator. It is a declaration of his intention to appropriate the ground. Without this a discovery of mineral would be unavailing. The locator is entitled to no appreciable time after discovery to determine whether he desires to locate and claim the benefit of his discovery. Discovery and posting notice of claim, therefore, must be practically contemporaneous, as against a subsequent appropriator of the same ground who enters peaceably. In most of the states provision is made for the posting of a preliminary notice of claim or discovery notice, to be followed later by an entirely different notice, meeting other requirements. See Lindl. Mines, §§ 351 et seq., 380. But here a preliminary or discovery notice is unknown to our laws. On the other hand, there is a positive requirement of statute that the notice shall be in such form as that a copy thereof may be recorded. In other words, the first notice posted by the locator must be such a notice as will, when recorded, answer all the requirements of a valid location notice, or, as elsewhere called, "location certificate." This being true, let us inquire what are the requisites of a valid record of a location notice or certificate. Section 2324 of the Revised Statutes of the United States provides:

"All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

And such is the requirement of our statute, with the addition that the notice shall contain a statement of the intention to locate. While, as before stated, the acts of congress do not require record of a location notice, yet, when the same is required by local legislation or regulations of miners, then the requirements of the federal statute become operative and imperative. *Brown* v. *Levan* (Idaho) 46 Pac. 661; *Faxon* v. *Barnard,* (C. C.) 4 Fed. 702. See Lindl. Mines, § 379, and authorities cited. A failure to comply with the terms of the United States statute must render the location notice ineffectual and void. Lindl. Mines, § 384. Tested by the foregoing rules, it is perfectly apparent that the notice of July 2, 1895, is wholly void, and conferred no rights on contestant. It appears from the record that thereafter, within three months, contestant had a survey of its claim made, and a location notice posted and recorded, which more definitely complied with the requirements of law, but we cannot understand how this can avail contestant. The proofs show that, at a time when contestant had posted no valid notice of location, applicants peaceably entered the premises and made a location of the same. This they had a legal right to do, so far as disclosed by this record. The court therefore erred in its instruction to the jury, for which error the applicants are entitled to a reversal of this cause.

3. The court in its instructions nowhere referred to the fact that our laws require the marking on the ground of a location in a particular way. Section 2, c. 25, of the Session Laws of 1889, in force when the locations in this case were made, provides as follows: "The surface boundaries of all mining claims hereafter located shall be marked by four substantial posts, or four substantial monuments of stone, set at each corner of such claim, such posts or monuments of stone shall be each plainly marked so as to indicate the direction of such claim from each monument of stone or posts." The monuments of contestant's location of May 2, 1895, so far as

disclosed by the record, were never marked until survey was made in June following, and long after the entry by applicants. This is a positive requirement of statute. We do not see how the same can be disregarded, any more than any of the other requirements of law. It was evident error on the part of the court to omit this element from its instructions to the jury.

4. During the pendency of this action, applicants procured from the receiver of the United States land office at Las Cruces, N. M., their receipt for the purchase of lot No. 967,—being the premises in controversy, and the same as embraced in their location of May 6, 1895, of the Last Attempt mine,— which receipt they offered in evidence. Contestant objected to the introduction of the same, and the objection was sustained, of which action by the court applicants complain. How this receipt came to be issued by the land office, in the face of the fact that this action was pending in support of contestant's adverse claim, does not appear. Section 2326 of the Revised Statutes of the United States provides that upon filing an adverse claim "all proceedings except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall be settled or decided by a court of competent jurisdiction or the adverse claim waived." This statute, upon the filing of the adverse claim, transfers the jurisdiction over the controversy from the land department of the government to the courts. The land department had no jurisdiction to act in any particular until the controversy had been determined in the court. The issuance of this receipt, upon whatever evidence it may have been issued, was absolutely void and of no effect. It remained for the court to determine for itself whether or not an action was pending to determine a controversy between the parties. *McEvoy* v. *Hyman,* (C. C.) 25 Fed. 539; *Richmond Co.* v. *Rose,* 114 U. S. 576. The action of the court, therefore, in excluding the receiver's receipt from evidence, was correct.

For the reasons assigned, the judgment of the lower court will be reversed, and the cause remanded for a new trial; and it is so ordered.

MILLS, C. J., and MCFIE, J., concur. MCMILLAN and BAKER, JJ., not having heard the argument of this cause, did not participate in this decision.

UNITED STATES v. ISAAC VAN WINKLE.

(113 Federal 903. Circuit Court of Appeals, Ninth Circuit. February 3, 1902.)

Official geological map to show character of land. On an issue whether public land on which timber was cut by defendant was mineral land, within Act Cong. June 3, 1878, authorizing residents of certain mineral districts to cut timber on mineral lands, a geological map of the territory in which the lands were located, issued by authority of interior department, was admissible for use in connection with the evidence of witnesses, and to show the general nature of the land described, its elevation and surroundings, and its situation with relation to lands proven to be mineral, where not in any way purporting to show the nature of the land in controversy, or to indicate that it was mineral.

Topographical map of survey. The admission of a certified copy of the "general description of the survey" of the township in which the land in controversy was situated, containing no reference to the particular land, but referring in general terms to the township, stating that it was mountainous, and that considerable placer mining had been done along a certain creek, and expressing the opinion that undeveloped quartz ledges existed in the ridges, even if error, could not have prejudiced plaintiff.

Good faith controls measure of damage. There being evidence that in cutting the timber defendant acted under what he believed to be the lawful authority of the United States, a request that the court direct a verdict for the United States for the full amount prayed for, on the ground that it had been proven that the lands were public lands, and that defendant had cut the timber without authority, was properly refused, because ignoring defendant's good faith.

In case defendant cut the timber in good faith, he was only liable for the value of the timber as cut, and not as manufactured.

Taking timber for roasting ore is taking for mining purposes. *U. S.* v. *United Verde Co.* 71 Pac. 954.

The timber act of June 18, 1878, allows the removal of timber not only from mining locations but from mineral lands generally. *U. S.* v. *Basic Co.* 121 Fed. 504.

Lessee of phosphate with power to take timber for tramways and fuel held to have no right to cut timber for miners' houses. *Lewis* v. *Virginia-Carolina Co.* 69 S. C. 364; 48 S. E. 280.

Under Act of June 3, 1878, timber may be cut on mineral lands for

In Error to the Circuit Court of the United States for the District of Idaho.

The United States brought an action against Isaac Van Winkle, the defendant in error, to recover the value of 90,000 feet of lumber, of the manufactured value of $7 per thousand feet, which lumber and logs were alleged to have been wrongfully and unlawfully cut from the public domain of the United States in the land district of Boise, Idaho. The defendant in error set up the defense that the lands from which said lumber and sawlogs were cut was mineral land of the United States, within the meaning of the act of Congress approved June 3, 1878, entitled "An act authorizing the citizens of Colorado, Nevada and the territories to fell and remove timber on the public domain for mining and domestic purposes," section 1 of which provides as follows: "That all citizens of the United States and other persons, bona fide residents of the states of Colorado or Nevada or either of the territories of New Mexico, Arizona, Wyoming, Dakota, Idaho or Montana, and all other mineral districts of the United States, shall be and are hereby authorized and permitted to fell and remove for building, agricultural, mining or other domestic purposes any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under the existing laws of the United States except for mineral entry, in either of said states, territories or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: provided, the provisions of this act shall not extend to railroad corporations." The jury returned a verdict for the plaintiff in error for the sum of $35.

R. V. COZIER, for the United States.

purposes of sale, nor can the Secretary by regulation prohibit cutting for such purpose. *U. S.* v. *Rossi*, 133 Fed. 380.

Timber does not include such trees as are only fit for cordwood. *Gibson* v. *Smith*, 18 L. D. 249. *Gosling* v. *Murphy*, 18 L. D. 306.

All residents may cut on mineral lands. *U. S.* v. *Lynde*, 47 Fed. 297.

Mining company may lawfully purchase charcoal from timber cut on mineral lands. Nature of claims considered mineral. *U. S.* v. *Richmond M. Co.* 40 Fed. 415. Contrary ruling as to right of railroad companies. *U. S.* v. *Eureka Co.* 40 Fed. 419.

Construction of the acts concerning cutting timber on mineral land. *U. S.* v. *Price Tr. Co.* 109 Fed. 239.

FREMONT WOOD and S. H. HAYS, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

We are precluded from considering the interesting and important question principally discussed in the brief of the plaintiff in error, whether the circuit court erred in the instructions given and refused to the jury concerning the meaning of the words "mineral lands," as used in the statute of June 3, 1878, for the reason that it appears from the record that no exception was taken to the instructions so given or refused. There remain, therefore, for our consideration, only the rulings of the court in admitting certain documentary evidence, and in denying the request of the plaintiff in error for peremptory instruction to the jury to find a verdict in its favor. The defendant in error, to support his defense, offered in evidence a geological map of Boise Basin, in which were located the lands from which the timber was cut, the map having been issued by the authority of the department of the interior as "Part III., P. 1, XCVI., 16th Annual Report of the Director of Geological Survey." It was admitted in evidence, over the objection of the plaintiff in error, that it was incompetent and hearsay. The map was identified, and shown to be substantially correct, so far as it represented the location of mines thereon. It was used in connection with the evidence of several witnesses. We think it was admissible for that purpose, as well as for the purpose of showing the general nature of the land described in the complaint, its elevation and surroundings, and its situation with relation to lands which were proven to be mineral. It does not in any way purport to show the nature of the precise land in controversy, or to indicate that it was mineral land. We are unable to perceive how its admission in evi-

dence could have been harmful or prejudicial to the plaintiff in error.

Error is assigned to the admission of the certified copy made by the surveyor general of Idaho of the "General Description of the Survey" of the township in which the lands are situated. The general description so admitted in evidence contains no reference to the particular land which is the subject of the suit. It refers in general terms to the township in which the land is situated, states that it is mountainous, etc., and that there has been a great deal of placer mining done along Grimes creek, and expresses the opinion that undeveloped quartz ledges exist in the ridges. We are inclined to the opinion that in an action such as this, where the nature of the land in controversy was a question in issue involved, reference might properly be had to the records of the land office as prima facie evidence, at least, of their character; but, in any view of this particular evidence, the plaintiff in error could not have been injured by its admission.

Nor was the plaintiff in error entitled to a peremptory instruction to the jury to find a verdict as requested. The request was that the court direct a verdict for the plaintiff for the full amount prayed for in the complaint, upon the ground that it had been proven that the lands were public lands, and that the defendant had not only entered and cut timber of the quantity and value manufactured, as charged in the complaint, but that he had done so without authority from the plaintiff in error, and without effort or attempt to comply with the rules and regulations of the secretary of the interior governing the cutting of timber from the public lands. This instruction, as asked for, ignores the right of the jury to take into consideration the question of the good faith of the defendant in error in cutting the timber as he did upon the public lands. There was evidence that in cutting the timber he acted under what he believed to be the lawful authority of the United States. Such being the case,

it was the province of the jury to determine whether his action was in good faith, and to measure the damages accordingly. If he acted in good faith, the law required the verdict of the jury to be for the value of the timber as cut, and not as manufactured. *Gentry* v. *U. S.* 41 C. C. A. 185, 101 Fed. 51. In the charge which was given by the court, the jury was instructed that in fact the defendant had not complied with the rules and regulations of the secretary of the interior concerning the cutting of timber upon government lands. From the amount of the verdict, which was $35, it is evident that the jury found that the timber was cut in good faith.

We find no error for which the judgment should be reversed. It is accordingly affirmed.

PEOPLE EX REL. CALUMET GOLD MINING & MILLING CO. v. DEFRANCE, JUDGE ET AL.

(29 Colorado 309; 68 Pac. 267. Supreme Court. Feb. 3, 1902.)

Prohibition treated as certiorari. Where a final judgment has been entered by a court having no jurisdiction certiorari is the proper remedy. But a petition for prohibition bringing up the whole record, the court will pass upon the merits.

Every suit may be a proceeding but not every proceeding is a suit. Where the act says that the costs of the proceeding shall abide the result of the suit it implies an inspection as a proceeding ancillary to a suit.

[1]**There must be a suit pending** before an order of court for the inspection of a mine can be made under the Colorado statutes providing for compulsory inspection and there can be no application independent of such suit.

Original Application for Writ of Certiorari.

MORRISON & DESOTO and WM. A. DIER, for petitioner.

[1]Nearly all the English and American cases commonly cited on Petitions for Inspection are printed in 7 and 8 M. R. under INSPECTION.

In every instance there seems to have been a suit pending. In Montana by special statute the order may be granted, though suit not brought. See *St. Louis Co.* v. *Montana Co.* 17 M. R. 283. *State* v. *Dist. Court*, 22 M. R. 195. ***State* v. *Dist. Court*, 22 M. R. 211.**

Inspection allowed in case of mining trespass. *Howe's Co.* v. *Howe's Ass'n*, 34 N. Y. Sup. 848.

Defendant required to unwater shaft to allow inspection; cost of same charged to plaintiff on dissolution. *Tyler Co.* v. *Last Chance Co.* 19 M. R. 525.

Charge to jury concerning duty on inspection. *Fleming* v. *Daly*, 12 Colo. App. 439; 55 Pac. 946.

When a jury view a mine after hearing irreconcilable evidence on the question of lode in place, their verdict should not be set aside. *Ormund* v. *Granite M. Co.* 11 Mont. 303; 28 Pac. 289.

Inspection acts are valid, but cannot be enforced across the boundary line of the state. *In re Carr*, 52 Kans. 688; 35 Pac. 818.

Plaintiffs may have discovery against defendant in action to re-

corporation desiring an inspection, examination or survey of such mine, lead, lode or mining claim, may present to the district court or the judge thereof, of the county wherein the mine, lead, lode or mining claim, of which an inspection, examination or survey is desired, is situated, a petition," etc.

Then follow specific provisions as to what the petition shall contain, with directions to the court or judge to appoint a time and place for hearing the same, and other directions for its execution are given in case the order is granted. The section closes as follows: "Provided, * * * the costs of the proceeding shall abide the result of the suit."

1. Under the facts disclosed by the petition, prohibition does not lie. Even though an inferior tribunal proceeds without jurisdiction, it does not necessarily follow that prohibition will lie to prevent further action if the party aggrieved has some other full and adequate remedy. *People* v. *District Court,* 26 Colo. 386; 16 Enc. Pl. & Pr. 1130 et seq. and cases cited.

No appeal or writ of error is authorized by the section. Yet the absence of these remedies does not, of itself, entitle petitioner to a writ of prohibition if there be left some other adequate and complete remedy. High's Ex. Legal Remedies (3d Ed.), 767, *et seq.*

Looking to the substance rather than the form, we are satisfied that the petition in this case is substantially an application for the common law writ of certiorari. It contains all the requirements of a petition in which that remedy is invoked. A judgment has been rendered in the proceeding before the district judge, which settles the controversy; hence it is a final judgment. Both parties concede it and are willing, as we understand them, to waive all technical questions of pleading that might operate to dismiss this proceeding. It also appears from the petition that a complete record of what occurred before the judge in vacation has been lodged, and is now on file with the clerk of the court. Had

there been no final judgment, or if such proceedings had not been made matter of record, it is possible that prohibition would lie. However that may be, we shall treat the present application as one for a writ of certiorari, and are of opinion that, under the facts, it affords a proper and complete remedy.

2. The question then recurs, did the district judge or court, in the absence of a suit pending, have jurisdiction to make the order for an inspection and survey of relator's mine? Respondents say that the fair construction of the section above quoted is that it is intended to cover two distinct classes of cases: *First,* an inspection and survey of a mine may be had where there is a suit pending in court whereby some question is raised concerning the title thereto; and, *second,* where there is no suit pending, yet an inspection and survey of one mine is necessary to protect the interest of an owner of another mine so that the applicant therefor may become possessed of the necessary facts or evidence upon which to predicate an anticipated action in which the aid of a court will be invoked to protect his right or interest.

There is more or less ambiguity in the language employed in this section, and its meaning is not entirely free from doubt. But construing the section as an entirety and in connection with kindred provisions of our statutory law, we think the intention of the general assembly may be gathered. We find that sections 259 and 260 of the code and 3164 and 3176, 2 Mills' Ann. Stats., are statutes *in pari materia* relating to the examination and survey of real property, and all of them contemplate the pendency of an action before an inspection or survey is permitted. Counsel for petitioner here state as a historical fact that the clause in this section which we have italicized was inserted to meet a case not covered by any other provision of our statute at the time of its passage into an act. They say that during some phase of the numerous suits in the somewhat famous litigation between

the Dives and Pelican mines a number of years ago in this state it was found that in order for one or both of the parties to make out their case or cases an inspection and survey of another mine or mines than those involved in the controversy was necessary, and so the italicized clause was, at the instance of one of the counsel engaged in that controversy, inserted in our code to confer the authority theretofore lacking. It would seem to be adequate for that purpose, and the historical explanation is sufficiently plausible to account for its existence.

But whether or not it furnishes the true reason which occasioned action by the general assembly is not material; for following certain well known rules of construction, taking into consideration all the statutes *in pari materia,* and construing them together and with reference to the principles of the common law in force at the time of their passage, and so construing every part of these kindred statutes in connection with the whole as to make them all harmonious, if practicable, we think the intention of the general assembly was that no inspection, survey or examination of a mine could be had unless there was at the time a suit pending which made the same necessary or proper for the protection of the interests of litigants. If respondents' contention is right, there was no necessity for the first clause. For if the second clause authorizes an inspection, irrespective of the pendency of an action, then it would embrace every case where an inspection is necessary both where there is, and where there is not, an action pending.

We need not determine whether a court of equity has the power exercised by the judge below, independent of statute, for the respondents rely solely upon this section. Were there any uncertainty about the construction which we have placed on the section upon the canons referred to, the proviso would, to our minds, be conclusive in its favor. It says that the costs of the proceeding shall abide the result of

the suit. Now, while every suit may, in a sense, be a proceeding, not every proceeding is a suit. The filing of an affidavit for an attachment in a pending action, or an application for a temporary writ of injunction, is a proceeding in a pending suit, but neither one of these is a suit. And when this proviso says that the costs of the proceeding shall abide the result of the suit, these terms are not used as synonymous, but the language means that there must be at the time a suit pending touching the title or interest of a mine. And the proceeding for an inspection is simply ancillary or auxiliary to that suit, the costs of which must abide its result. Had the general assembly intended that those costs should be taxed in a future suit, it would have required a suit to be brought; or that costs should be taxed in the proceeding itself, it would have been only natural to say that costs were to abide the result of that proceeding.

Counsel's citation of the case of *Wilkins* v. *Abell*, 26 Colo. 462, to the point that the office of a proviso is not to enlarge or extend, but rather to put a limitation or restraint upon the language which the lawmaker has used in the body of the act, is unfortunate. It was held in that case that the general purpose of a proviso was to except something from, but not to add anything to, the act. Applying that rule to the construction of this section, and what is the result? According to respondents' contention the unrestricted language of the second general clause is comprehensive enough to authorize an inspection of a mine where there is no suit pending involving the right or title to it. Even if that should be conceded, then this proviso puts a limitation upon the body of the act and excepts from its operation cases in which no suit is pending; for it would be a useless provision to say that the costs of the proceeding shall abide the result of the suit unless there was a suit pending in which such costs could be taxed. There is not affixed to the granting of the order of inspection, as a condition precedent, that a suit must thereafter be

brought by the one applying for the order. There is no obligation imposed on him to do so. And if there is no pending suit, the proviso becomes, or may become, meaningless and wholly inoperative, because absence of suit, present or future, would prevent taxing, or compulsory payment, of costs of the proceeding.

The construction which we have given does no violence to the language of the section, but, as we think, is the obvious and natural one. It carries out the intention of the legislature and protects every legitimate right which an owner of a mine possesses. To give it the construction contended for by respondents would require us to disregard all other statutes of this state *in pari materia,* render nugatory the proviso, and open the door to an abuse of an extraordinary power which, though courts of equity may possess, nevertheless, when exercised by them, is surrounded by those safeguards which experience has shown could not be furnished if respondents' contention were adopted.

While not controlling, yet it is a circumstance worth noting that since the enactment of this section only two applications, so far as the present members of this court are advised, have been made in this state for the order when there was no suit pending upon which to base it.

The demurrer is overruled, the motion to discharge the rule to show cause is denied, the same is made absolute, and the temporary restraining order is made permanent.

FRED W. MORRISON ET AL. v. TIMOTHY REGAN.

(8 Idaho 291; 67 Pac. 955. Supreme Court. February 4, 1902.)

A tie to a mine is a valid tie. A description in the notice of location of a mining claim is sufficient, under section 2324, Rev. St. U. S., and secton 3102, Rev. St. Idaho, which describes the claim as located a certain number of feet from another mine, giving the direction, as a mine is a "natural object" or "permanent monument," within the meaning of those terms as used in said statutes.

Sufficient description. A location certificate containing the following description *held* sufficient, under the provisions of said section 2324, Rev. St. U. S., and section 3102, Rev. St. Idaho, to wit: That the locators "have located 600 linear feet along this lode or vein of quartz, by 300 feet on each side of the middle of the vein or lode, making 600 feet in length. This claim so located is named the 'Bullion Mine,' and is situated in French mining district, Owyhee county, Idaho territory, and is described as follows: Commencing at this stake and notice, which is situated about 300 feet in a northwesterly direction from the Minnesota mine; this is an extension of the Red Jacket mine; and running thence along the vein or lode in a southerly direction to a similar stake and notice. We the undersigned, claim 600 linear feet in a southerly direction from this stake and notice to a similar stake and notice. This claim is 600 linear feet long."

When courts may reject. It is only where the location certificate fails to make reference to natural objects or permanent monuments sufficient to identify the claim that a court may reject it on that ground.

Good faith. Sufficient notice. Where it is shown that a mining claim has been located in good faith, if by any reasonable construction the language used in the notice in the description and in referring to natural objects and permanent monuments will impart notice to a subsequent locator it is sufficient.

A liberal construction should be given to descriptions of mining claims and references to natural objects in location certificate.

Amendment of defective records. Erroneous or defective location certificates may be amended under the provisions of section 5 of an act entitled "An act to define the manner of locating lode, quartz, and placer claims. * * *" Sess. Laws 1899, p. 237.

Such amended location relates back to the date of the original location, provided it does not interfere with the existing rights of others at the time when such amendment is made.

Proviso only applies where boundaries changed. The proviso to said section does not apply to amended locations, where, by the amendment, the surface boundaries are not changed, or when no part of an overlapping claim which has been abandoned is taken in by such amended location. Said proviso only applies where the boundaries are changed, or where part of an overlapping claim which has been abandoned is taken in.

The agent or any one authorized to do so can make an amended or additional location. Such authority is not required to be in writing.

[1]**Liberal rule on evidence.** On the trial of an action like the one at bar, all evidence tending to show the right of the plaintiff to the possession of the land in controversy is competent evidence, and should be admitted.

(Syllabi by the Court.)

Appeal from District Court, Owyhee County; GEO. H. STEWART, Judge.

Action by Fred W. Morrison and others against Timothy Regan. Judgment for defendant, and plaintiffs appeal. Reversed.

J. G. WATTS and M. A. FOLSOM, for appellant.

JOHNSON & JOHNSON, J. F. NUGENT and C. M. HAYS, for respondent.

SULLIVAN, J. This is an action in support of an adverse claim made by the plaintiff against the application for a patent made by the defendant to the Summit lode mining claim, situated in French mining district, Owyhee county. The complaint alleges, *inter alia*, that the plaintiffs were the owners of a certain lode mining claim known as the Bullion; that said claim was located on the 1st day of January, 1887, by James Shaw and Simon Morrison; that on the 19th day of September, 1900, the plaintiffs by their agent made an

[1]*Wells* v. *Davis*, 21 M. R. 1. *McCann* v. *McMillan*, 21 M. R. 6. *Fissure Co.* v. *Old Susan Co.* 21 M. R. 125.

amended location of said Bullion claim; that the plaintiffs and their grantors have performed the annual work required by law upon said Bullion claim from the date of its location to the present time, and have performed all other acts required to entitle them to hold said claim, and that during all the time since January 1, 1887, the plaintiffs and their grantors have been in actual, open, notorious, undisputed, and uninterrupted possession of said premises; that on the 10th day of January, 1901, the defendant filed in the United States land office, at Boise City, an application for a patent to the Summit lode claim, which conflicts with and overlaps the said Bullion claim. The answer denies the validity of the Bullion location, and puts in issue the material allegations of the complaint. A cross complaint was filed by the defendant, which was answered by the plaintiffs. On the trial plaintiffs introduced some evidence of discovery, location, posting, and recording of notice of location, and thereupon offered in evidence the location notice, which is as follows:

"Bullion. Notice of Relocation. Notice is hereby given that we, the undersigned, having complied with the requirements of chapter six of title thirty-two of the Revised Statutes of the United States, and of the laws of Idaho territory, relating to the location of mining claims, and all local customs, laws, and regulations, have located six hundred (600) linear feet along this lode or vein of quartz, by three hundred (300) feet on each side of the middle of the vein or lode, making 600 feet in width. This claim so located is hereby named the 'Bullion Mine,' and is situated in French mining district, Owyhee county, Idaho territory, and is described as follows: Commencing at this stake and notice, which is situated about 300 feet in a northwesterly direction from the Minnesota mine,—this is an extension of the Red Jacket mine; and running thence along the vein or lode in a southerly direction to similar stake and notice. We, the undersigned, claim six hundred (600) linear feet in a southerly direction from this stake and notice to a similar stake and notice. This claim is six hundred (600) linear feet long. Dated January 1st, year 1887. Locators: James Shaw, 300 feet. Simon Morrison, 300 feet.

"Territory of Idaho, County of Owyhee—ss.: I, James Shaw, do solemnly swear that I am acquainted with the mining ground described in the notice of location herewith, called the Bullion ledge, lode, or claim, and that the ground and claim therein described, or any part thereof, has not, to the best of my knowledge and belief, been heretofore located according to the laws of the United States and of this territory, or, if so located, that the same has been abandoned or forfeited by reason of the failure of such former locators to comply in respect thereto with the requirements of said laws. James Shaw.

"Subscribed and sworn to before me this first day of January, 1887. James Lyman, County Recorder.

"Filed January 1st, 1887, at 2 o'clock p. m. James Lyman, County Recorder.

"Recorded in Book 7 of Mining Claims, on pages 260 and 261, among the records of Owyhee county, Idaho. [Certified by E. L. Ballard, ex officio recorder of said Owyhee county, to be a correct copy of the original record.]"

Counsel for defendant objected to the introduction of said notice on the ground that there is no such description in the notice by reference to such natural objects or permanent landmarks or contiguous claims as is sufficient to identify the claim under the statutes. Thereupon James Shaw was called as a witness, and testified that the Minnesota and Red Jacket mines mentioned in said notice were well-known claims, and that as near as he could recollect the Minnesota claim was 600 feet by 100 feet, after which said objection was argued by respective counsel. The objection was sustained by the court, and the notice of location was not admitted in evidence.

George A. Sonnemann was then called by plaintiffs, and testified that he made an amended location of said Bullion lode by authority of the owners; that he had a lease and bond on the same, and that thereunder he had the right to work said Bullion lode, and also had the privilege of perfecting the title and applying for a patent; that he made an amended location of said Bullion lode on the 19th day of September, 1900; thereupon said amended location notice was offered in evidence, which offer was objected to by counsel for the

defendant for the reasons that a void original location notice is not susceptible of amendment; that the testimony does not show the person who made the amended location had proper authority to make it; that the pleadings show that between the date of the original location and date of the amended location, in 1900, rights to claims upon which the defendant is applying for patent have intervened, and for the reason that no amended location can be made so as to cut off intervening rights, and that the amended location is not in the names of the same parties that made the original location. In passing upon that objection, the trial court said: "I am inclined to think that this amended location becomes effective only by reason of the fact that there was an original location. The court has held that there was no original location so far as the evidence in this case is concerned, and that being true, there was nothing to amend." The objection was then sustained, and the court refused to admit said amended location notice in evidence. Thereupon the witness James Shaw was recalled, and testified that the lode claim for which the defendant is applying for a patent was located January 1, 1892, five years after the location of said Bullion claim; that he had done the assessment work annually on the Bullion since its location, in 1887. Counsel for plaintiffs then offered in evidence certified copies of proof of labor on said Bullion claim, which offer was objected to on the ground that proof of labor was entirely immaterial, for the reason that the court had excluded the original notice of location, and had held that void. The objection was sustained by the court. Thereafter counsel for plaintiffs offered other evidence in support of the allegations of the complaint, and under the objection of counsel for the defendant it was all rejected, on the ground that it was immaterial, for the reason that the original location notice had been excluded and declared void, and for that reason no further questions were proper. Thereafter, on motion of counsel for defendant, the

cross complaint was dismissed. Thereafter counsel for plaintiffs asked permission to recall the notice that they had rested their case, and asked permission to introduce proofs of the present ownership of said Bullion lode mining claim; to which request counsel for defendant objected, on the ground that the court had already excluded the location notice of said Bullion claim, and for that reason the question of ownership was not before the court, which objection was sustained by the court. Counsel for defendant then moved for a nonsuit on the ground that plaintiffs had failed to prove any valid location of the Bullion lode mining claim, or any right, title, or interest to the ground in conflict; that plaintiffs take nothing by their action; and that the same be dismissed, without costs against the plaintiffs. The motion was granted, and judgment of nonsuit was entered. This appeal is from the judgment.

Twelve errors are assigned on which the plaintiffs, who are appellants, rely for a reversal of the judgment. The refusal of the court to admit in evidence the original location notice of the Bullion mining claim is assigned as error, a copy of which notice is above set forth. When said notice was offered in evidence counsel for the respondent objected to its introduction on the ground that it contained no such description, by reference to such natural objects or permanent landmarks or contiguous claims, sufficient to identify said claim, as required by law. After said offer and objection was made, and before a ruling thereon by the court, counsel for appellants, by the witness James Shaw, proved that the Minnesota and Red Jacket mines named in said notice of location were well-known claims, and that the Minnesota claim was 600 by 100 feet. The objection was then argued and submitted to the court for decision. The objection was sustained, and the notice excluded.

It is contended that said notice of location failed to comply with the provisions of section 2324, Rev. St. U. S., and sec-

tion 3102, Rev. St. Idaho. Section 2324, Rev. St. U. S., is as follows:

"All records of mining claims hereafter made shall contain the names of the locators, the date of the location, and such description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim."

Section 3102, Rev. St. Idaho, is as follows:

"The notice must contain the date of the location, the names of the locators, the name of the claim, ledge or lode, the quantity in feet claimed along the ledge or lode, the width claimed from the middle of the vein, and must also give such a description of the locality of the claim, by reference to natural landmarks or fixed objects, and contiguous claims, if there be any, as to render the situation of the same reasonably certain from the letter of the notice itself."

The court held that the location notice of the Bullion claim did not sufficiently comply with the provisions of said sections of the Revised Statutes of the United States and of the state of Idaho, above quoted, and refused to permit its introduction as evidence. That ruling of the court was based on the decisions of this court in *Brown* v. *Levan,* (Idaho) 46 Pac. 661, and *Railroad Co.* v. *San Garde* (Idaho) 61 Pac. 137. And because of the meager statement of the facts in the case of *Brown* v. *Levan* we are not surprised that the court held the Bullion lode notice of location defective, in that it failed to "give such a description of the locality of the claim, by reference to natural landmarks or fixed objects and contiguous claims, as to render the situation of the same reasonably certain from the letter of the notice itself." That case involved the title to the Magpie mining claim, and that portion of the location notice purporting to comply with the provisions of the sections of statute above quoted is as follows:

"The mining claim hereby located is situated in * * * mining district, Boise county, state of Idaho, and is particularly described as

follows, to wit: Being situated and located on the north side of North Willow creek, about one-half mile from the Hurt mines, the direction being southwest. The adjoining claims are the Gem of the Woods on the north, the Kid on the south, and the Greyhound on the east."

On the trial of said cause, in support of the allegations of the complaint, and to show the location of said Magpie claim, said notice of location was introduced, also oral testimony as to what was known as the "Hurt Mines," mentioned in said notice, and it also appeared that neither the Kid mining claim, nor the Greyhound mining claim, referred to in said location notice as adjoining claims, were located at the time of the location of the Magpie, and that the Gem of the Woods claim therein mentioned never was located, and, as neither of said mentioned claims had been located when the Magpie location was made, reference to them as natural landmarks or fixed objects or as contiguous claims could not be made a compliance with said provisions of the statutes of Idaho and the United States, *supra*. The evidence as to what constituted the "Hurt Mines," as referred to in said location notice, is largely quoted in said opinion, and it is not necessary to quote it here. It is sufficient to say that the evidence clearly showed that there were no "Hurt Mines" located about one-half mile in a southeast direction from the Magpie. William Francis testified that the Silver Spray mine, one of the Hurt mines, was located southwest of the Magpie, and the Old Man mine, which was another Hurt mine, was located about 1,000 feet east of the Magpie. Hurt testified that the Silver Leaf, another of the Hurt claims, was southeast of the Magpie, and joins, or nearly joins, it; that the Old Man is east of the Magpie, and the Grey Eagle east of the Old Man claim. The evidence entirely fails to show that the Hurt mines were about one-half mile northeast of the Magpie claim, or that the Magpie claim is about one-half mile southwest of the Hurt mines. One of the Hurt mines was south-

west of the Magpie, and another adjoining the Magpie, or nearly so, on the east, and another about 1,000 feet east of it, and the Birthday claim about a half a mile northeast of it. Under those facts, the court held that the reference in said notice of location to the Hurt mines as a permanent monument was not a sufficient compliance with the provisions of the above-quoted statutes.

The evidence clearly showed the mines known as the "Hurt Mines" in that locality were not about one-half mile in a northeasterly direction from the Magpie claim, and contiguous. One claim was southwest of it, another east of it and adjoining it, and another about 1,000 feet east of it, and another about one-half mile northeast of it. Said four claims were known as the "Hurt Mines." Being so scattered and in divers directions from the Magpie claim they were not a natural landmark or fixed object such as would identify the Magpie claim by simply referring to them in the notice of location thereof as being "about one-half mile from the Hurt mines, the direction being southwest."

Under the provisions of said section 2324, Rev. St. U. S., and section 3102, Rev. St. Idaho, reference may be made, in a notice of location of mining ground, to a located mining claim, as a mining claim is a natural object, or landmark, or fixed object, within the meaning of said provisions; but such reference must be reasonably certain, which was not so in the Magpie location notice. It has been frequently held that reference to well-known mining claims is a sufficient compliance with the law. *Hammer* v. *Milling Co.* 130 U. S. 291, 32 L. Ed. 964; *Duncan* v. *Fulton,* (Colo. App.) 61 Pac. 244; *Kinney* v. *Fleming,* (Ariz.) 56 Pac. 723. There are some early decisions to the contrary, but the supreme courts of the United States, of Arizona, and of Colorado, in the decisions above cited, hold as above stated.

It was inadvertently stated in the decision of *Brown* v. *Levan, supra,* that the requirement of said section 3102, Rev.

St., in reference to naming the adjoining claims in the location notice, had been complied with, when the record shows that the mining claims named in said notice as adjoining claims had not been located at that time. If they had been located prior to the location of the Magpie, reference to them as adjoining claims would have been a sufficient reference to a natural object, landmark, permanent monument, or fixed object to come within the provisions of said statutes, and the conclusion would have been different; for under the provisions of said section 3102, Rev. St., reference might have been made to an adjoining claim as a natural landmark, fixed or permanent object, as the natural object may adjoin or be upon the claim located, for the law does not require that it be some distance from it. In the case of *Railroad Co.* v. *San Garde, supra,* this court held that, as the location notice failed to give the direction of the mining claim from the mouth of "Big Cañon" (the natural object to which it was attempted to tie said mining claim), it failed to comply with the provision of the law in that regard, and adhered to the rule laid down in the case of *Brown* v. *Levan, supra.* There the notice failed to give the direction of the claim from the fixed object to which an attempt was made to tie it.

We shall now recur to the location notice or certificate of said Bullion mining claim, and the ruling of the court in refusing to admit it in evidence on the trial. The court evidently rejected said notice upon an inspection of the notice itself. No evidence was permitted to be introduced as to the sufficiency or insufficiency of said notice, and no evidence by which the court could determine whether the references and statements in said notice were true or not, or sufficient to render the situation or location of said mining claim reasonably certain from the letter of the notice itself, except the witness Shaw was permitted to testify that the Minnesota and Red Jacket mines mentioned in said notice were well-known mines, and that the former was 100 by 600 feet. The

location notice was rejected as being insufficient on its face. It is well established by numerous decisions that only where the insufficiency of the location certificate, in its failure to make intelligent reference to natural objects or permanent landmarks, is apparent on its face, the court may reject it. *Dillon* v. *Bayliss,* 11 Mont. 171, 27 Pac. 725; *Darger* v. *Le Sieur,* (Utah) 30 Pac. 363; *Hammer* v. *Milling Co.* 130 U. S. 291, 32 L. Ed. 964; *Russell* v. *Chumasero,* 4 Mont. 309, 1 Pac. 713; *Railroad Co.* v. *San Garde,* (Idaho) 61 Pac. 137; *Farmington M. Co.* v. *Rhymney Co.* (Utah) 58 Pac. 832, 77 Am. St. Rep. 913; *Flavin* v. *Mattingly,* 8 Mont. 242, 19 Pac. 384. Of course, if there is a total failure to make any reference to such objects whatever the certificate would not be sufficient.

The location certificate under consideration states that the Bullion claim is 600 feet in length along the vein or lode, and 300 feet on each side thereof, commencing at a stake and notice situated about 300 feet in a northwesterly direction from the Minnesota mine; that it is an extension of the Red Jacket mine; and running thence along the vein or lode in a southerly direction to a similar stake and notice; and that the locators claim 600 linear feet in a southerly direction from this stake and notice to a similar stake and notice. It is stated in the notice that the Bullion is an extension of the Red Jacket mine, and runs thence along the vein or lode in a southerly direction. This description fixes the Bullion as a southerly extension of the Red Jacket; hence it adjoins that mine on the southerly end.

Said section 2324, Rev. St. U. S., requires the certificate of location to contain the name of the locators, the date of the location, and a description of the claim by reference to such natural object or permanent monument as will identify it; and said section 3102, Rev. St., provides, among other things, that such certificate must contain such a description of the locality of the claim by reference to natural land-

marks, or fixed objects and contiguous claims, if there be any, as to render the situation reasonably certain from the letter of the notice itself. We think said notice, on its face, contains a substantial compliance with said provisions, and the court erred in not receiving it in evidence.

In *Hammer* v. *Milling Co., supra,* the certificate of location read: "This lode is located about fifteen hundred feet south of Vaughn's Little Jennie mine." The supreme court of Montana held that that was a sufficient reference to a natural object or permanent monument, within the meaning of the provisions of the statute. And the supreme court of the United States in sustaining that decision said: "We agree with the court below that the Little Jennie mine will be presumed to be a well-known natural object or permanent monument until the contrary appears." In the case at bar it is made to appear by oral testimony that both the Minnesota and Red Jacket mines referred to in said notice of location are well-known mines in that vicinity, and that the stake and notice first referred to therein are situated about 300 feet in a northwesterly direction from the Minnesota mine. So far as appears from the record, said Minnesota and Red Jacket mines may be patented mines, but that is not required, as they are well-known mines in that vicinity. See *Russell* v. *Chamasero,* 4 Mont. 309, 1 Pac. 713.

In *Farmington M. Co.* v. *Rhymney Co.* (Utah) 58 Pac. 382, 77 Am. St. Rep. 913, the certificate of location was quite loosely drawn, and we think the correct rule in regard to the question under consideration was there laid down. In passing upon the sufficiency of that certificate, the court said: "If by any reasonable construction, in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, it is sufficient."

As stated in that opinion, prospectors, as a rule, make no pretensions of scholarship, are neither surveyors nor lawyers, and if in their notices of location technical accuracy of ex-

pression was an absolute requirement the object of the law would in many cases be defeated, and great injustice result by disturbing possession, after much hard labor had been performed and money expended. We think the history of mining in this country shows that much more injustice has been done by depriving men who have in good faith located valuable mines, and thereafter been deprived of them by reason of some technical defect in their certificate of location, than has resulted in the "floating" of claims often referred to in the decisions of courts in this class of cases. A liberal construction should be given to location certificates, and their sufficiency with reference to natural objects or permanent monuments is a question of fact, where natural objects or permanent monuments are referred to therein. Where the location certificate contains a reference to a landmark, it should not, upon a mere inspection of the certificate and in the absence of evidence, be declared insufficient, unless it clearly fails to identify the claims. *Russell* v. *Chumasero, supra; Hammer* v. *Milling Co., supra; Flavin* v. *Mattingly,* 8 Mont. 242, 19 Pac. 384.

If the rule laid down in the case at bar in any manner conflicts with the rule laid down in case of *Brown* v. *Levan, supra,* that case is overruled to the extent of such conflict; but the facts in that case show that the claims referred to as the "Hurt Mines" were not situated with reference to the Magpie claim as stated in the location notice, and that the mining claims named as adjoining claims were not located until some time after the Magpie claim had been located, and one of them never was located.

The second error relied upon is the refusal of the court to receive the amended certificate of location in evidence. The court refused to admit said certificate for the reason that the original certificate had been held void by the court. As we have above held that the court was in error in holding the original certificate void, it follows that the ground for refus-

ing to admit the amended certificate was not well taken.

Section 5 of an act entitled "An act to define the manner of locating lode quartz and placer claims, * * * " approved February 14, 1899 (Sess. Laws 1899, p. 237), is as follows:

> "If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous or that the requirements of the law had not been complied with before filing, or shall be desirous of changing the surface boundaries, or of taking any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator or his assigns, may file an additional certificate subject to the conditions of this act, and to contain all that this act required an original certificate to contain: provided, that such amended location does not interfere with the existing rights of others at the time when such amendment is made."

That section provides for the amendment of original certificates of location, and provides that if the locator shall apprehend that his original certificate was defective, erroneous, or that the requirement of the law had not been complied with, etc., such locator or his assigns may file an amended certificate curing such defects, and such amended certificate relates back to the date of the original location, provided that it does not interfere with the existing rights of others. Most, if not all, of the mining states have similar statutes, that have been considered and construed by the federal courts and the supreme courts of those states. From such statutes, and the decisions under them, it is clear that an amended certificate may cure a defective or erroneous original certificate, and relates back to the date of the original, except when such original certificate is absolutely void, or when the rights of others have intervened between the date of the original and amended locations.

First, we shall consider whether a void original certificate

can be amended. In *McEvoy* v. *Hyman*, (C. C.) 25 Fed. 596, the circuit court of the United States in discussing the right to amend says: "Errors and mistakes in certificates of location are of frequent occurrence. Under the law as it is at present, a fully complete and unimpeachable certificate cannot be made without the aid of a surveyor and the best instruments. It is often, and perhaps generally, impracticable to obtain the services of a surveyor in making a location, and the miner must depend upon his own skill and judgment. In such effort he usually fails. Indeed, it may be said, as to the course of his lines, he is always in error, and the natural object and permanent monument required by section 2324 are entirely beyond his grasp. He does not know what they are, nor how to refer to them. Every one who is at all familiar with mining locations knows that in practice the first record must usually, if not always, be imperfect. Recognizing these difficulties, it has never been the policy of the law to avoid a location for defects in the record, but rather to give the locator an opportunity to correct his record whenever defects may be found in it." And the court there held that the section of the Colorado statutes which declares that defective certificates shall be void must be read in connection with the section authorizing amendments, and when so read the section will be construed as saying that defective certificates are lacking in force and sufficiency until amended, but are not wholly void. In *Frisholm* v. *Fitzgerald,* (Colo. Sup.) 53 Pac. 1109, it was held that a mining claim location certificate may be amended to cure failure to refer to a natural object or permanent monument, though between the filing of the original and amended certificate another had filed on the claim. It would appear from this decision that no reference was made in the original certificate whatever to a permanent object. The section of the Colorado statute under consideration in that case was similar to our section 5 above quoted, in that it provides for the correc-

tion of errors and defects occurring in the original certificate, and it authorizes a change of boundaries or taking in of territory not included in the original certificate, and the court in that case say: "The plain purport and effect of the first clause is to enable the miner, who in good faith has gone upon the public domain and expended time and money in performing the substantial acts required to locate a mining claim, but through inadvertence or ignorance has failed to comply with the requirements of the statute in describing his claim, to cure such error at any time by an amendment correcting the defective description, and thus perfect his record as of the date of the original certificate. We do not understand that the proviso has reference to amendments of this character, but is only applicable to a change of boundaries and relocation that shall take in territory not before included within the claim,"—although Campbell, C. J., and Gabbert, J., state, in a concurring opinion, that they express no opinion in regard to the construction of said statute. The rule there laid down is clearly the one applicable to the provisions of said section 5, and with that construction those provisions may be made to protect the rights of the locator, without prejudicing any interests that third parties have rightfully acquired. In *Strepey* v. *Stark,* 7 Colo, 614, 5 Pac. 111, it is said: "And even when the certificate for any of the reasons set forth in the statute is deemed void, it has been admissible in evidence with a valid amended certificate correcting the defects of the original." See, also, *Van Zandt* v. *Mining Co.* (C. C.) 8 Fed. 725, 2 McCrary, 159; *Jordan* v. *Schuerman,* (Ariz.) 53 Pac. 579; *Moyle* v. *Bullene,* (Colo. App.) 44 Pac. 69.

The above-cited decisions are from Colorado, a state where there is a statutory provision which declares that, where the certificate fails to describe the claim with reference to some natural object or permanent monument, it is void. We have no such provision. This court is in accord with the rule laid

down in those decisions upon the question under consideration here. If in making the amended location it included land not included in the original location, and interfered with existing rights as to such land, the amended location would not relate back to the date of the original location, so far as the recently included land is concerned. The record shows that the amended location was made by one having authority to make such location. Such authority is not required to be in writing.

We have examined assignments of error numbered from 3 to 10, inclusive, and concluded that the court erred in not admitting the evidence referred to in said assignments. The trial court, however, took the view that the original certificate of location was absolutely void, and on that ground rejected said evidence.

It follows that the court erred in granting the nonsuit, and the judgment is reversed, and the cause remanded for further proceedings. Costs of the appeal are awarded to the appellants.

QUARLES, C. J., and STOCKSLAGER, J., concur.

FRANK R. ABBEY v. JEROME B. WHEELER ET AL.

(170 New York 122; 62 N. E. 1074. Court of Appeals. Feb. 25, 1902.)

Costs on double appeal. On dismissal of one of two appeals from a judgment on two separate records presenting the same question, costs will be allowed against appellant, though it was taken from an abundance of caution to settle a doubtful question of practice, and the appellant is successful on the other appeal.

Appellate practice. Where a judgment is entered by the general term reversing a judgment of the special term on demurrer, and directing a final judgment unless plaintiff shall amend his complaint within a certain time, it is not, when perfected by entry of final judgment dismissing complaint on failure of plaintiff to amend, a final determination of the general term on the issue raised by demurrer, and appealable to the court of appeals, but an appeal should be taken through the appellate division from the judgment so rendered.

[1]**Co-tenant may bring accounting.** A tenant in common of mining land may sue a co-tenant who has taken possession for an accounting, where such co-tenant has worked the mines and sold the deposits, since the action is not one to recover for the use and occupation or for rents and profits, but for a part of the estate itself which the co-tenant has taken and carried away.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Frank Richards Abbey against Jerome B. Wheeler and others. From a judgment entered on an order

[1] *Fulmers App.* 17 M. R. 246.

Co-tenant cannot take coal without accounting, on pretense of only taking his share. *Cecil* v. *Clark*, 47 W. Va. 402; 35 S. E. 11.

A half owner of the minerals has no right to maintain a pipe line across the common ground for purpose other than the mining of it. *Pioneer Co.* v. *Shamblin*, 140 Ala. 486; 37 So. 391.

Plaintiff and defendant owned each one-half of a 1040 tract of timber land valuable only for its pine trees: *Held*, that defendant should be enjoined from boxing more than one-half of the timber. *Leatherbury* v. *McInnis*, 85 Miss. 160; 37 So. 1018.

of the general term reversing an interlocutory judgment of the special term overruling a demurrer to the complaint, plaintiff appeals, and from an order of the appellate division (69 N. Y. Supp. 432) affirming a final judgment dismissing the complaint entered on an order of the general term sustaining a demurrer thereto he also appeals. First appeal dismissed, and judgment on second appeal reversed.

CHARLES D. CLEVELAND and HARRY W. HAYWARD, for appellant.

EUGENE FRAYER, for respondents.

O'BRIEN, J. The only question presented by the pleadings in this case was the sufficiency of the complaint. It was met by a demurrer on the part of the defendant Wheeler, which raised the question whether it contained a statement of facts sufficient to constitute a cause of action. The special term held that it did, but the general term, then existing, held that it did not, and so reversed the special term, and gave the plaintiff leave to amend. The plaintiff did not amend, however, but suffered final judgment to be entered dismissing the complaint upon proof that he failed to avail himself of the permission to amend.

But the appeal comes here now in such a questionable form that we are obliged to decide other questions than those raised by the demurrer. The merits of the controversy are obscured by questions of practice, somewhat in the nature of experiments, which we are required to solve, and which, if the counsel had in some way solved for themselves, would be a great relief to the court. The plaintiff brings two appeals to this court from the same judgment upon two separate records, both presenting the same question, namely, the sufficiency of the complaint. It is admitted that one or the other of these appeals must be dismissed, but we are left

practically to find out for ourselves which appeal was properly taken, and which record we are to review. We cannot perceive from the elaborate briefs presented by the learned counsel for the plaintiff that they have yet come to any definite conclusion on the question, except to insist that, whatever we do with one or the other of the appeals, it should be without costs to the plaintiff. The two appeals, it is said, were taken for abundant caution, and in order to make it certain that the plaintiff could be heard in this court upon one record or the other. Why the plaintiff should be relieved from the costs of such an experiment is not very clearly perceived. If the practice was so doubtful as to justify two appeals as a matter of precaution, the law ought not to be settled at the defendants' expense.

On the 15th of December, 1900, the plaintiff appealed to this court from the final judgment dismissing the complaint. This appeal, I think, is regular. It brings up the final judgment and the interlocutory judgment, and therefore brings up all questions decided upon the issue on the demurrer. The fact that the complaint was dismissed long after the general term had passed upon the question at issue, and upon motion showing the default in another court, is of no importance. The judgment was entered upon the direction and by the authority of the general term, and therefore was a final and actual determination of the action in that court within the fair meaning of the statute. The special term decided nothing, but was a mere instrument to execute the judgment which the reviewing court had already pronounced. *Adams* v. *Fox,* 27 N. Y. 640; *Stevens* v. *Bank,* 162 N. Y. 253, 56 N. E. 628; *Johnson* v. *Signal Co.,* 125 N. Y. 720, 26 N. E. 455; *Elwell* v. *Johnson,* 74 N. Y. 80; *Smith* v. *Rathbun* 88 N. Y. 660.

It is true that the judgment of the general term reversing the judgment and holding that the demurrer was well taken could not be reviewed here as matter of right until final

judgment was entered. An appeal here before that event, or before the proceedings had reached that stage, would have been premature. But the general term directed a final judgment unless the plaintiff should amend within a certain time, and he failed to avail himself of the favor; so the final judgment already directed was then formally entered, and, when entered, became the actual determination of the general term, the same as if that court had not given leave to amend, but had simply dismissed the complaint. Hence the judgment of reversal, when so perfected, was appealable to this court as the final and actual determination of the general term upon the issue raised by the demurrer. It may be added that the final judgment bears no evidence upon its face that it was rendered at special term. So far as the record shows, it was entered by the clerk as upon default.

On April 8, 1901, the plaintiff brought a second appeal from the judgment of the appellate division affirming the final judgment, treating that as a judgment of the special term upon the default. It is obvious that the court below, in entertaining the plaintiff's appeal from this final judgment, could decide nothing except what it had decided before, and hence was practically reviewing one of its own judgments. The appeal to that court from the final judgment was, therefore, unnecessary, and unauthorized, since it had already directed upon the former appeal that, unless the plaintiff elected to plead over, his complaint should be dismissed; and it was dismissed, and this judgment of dismissal was the judgment of the general term, and not the judgment of the special term. The latter court only followed the directions of the former, and decided nothing with respect to the question at issue raised by the demurrer.

But it is not necessary to enlarge this opinion by a discussion to show that the second appeal was improper. It is quite sufficient to say that, since the first appeal was regular, the second cannot be, as there is no authority for two concurrent

appeals from the same judgment by the same party upon the same question. Nor is it a reasonable or tenable view of such a case to hold that, before a party can be heard in this court on the question of law raised by the demurrer, that question must be passed upon twice in the court below. The second appeal in this case is founded upon this theory. It should be observed that the case of *Leonard* v. *Barnum,* 168 N. Y. 41, 60 N. E. 1062, differs widely from this, since in that case the general term gave no direction for final judgment. In this case it did, and, as before remarked, when that direction was carried out, it became and was the judgment of the court that gave the direction, although it was entered in another branch of the same court where the record was filed and the formal motion made.

This brings us back to the question raised by the demurrer, and we think it was correctly decided at the special term. The complaint, we think, does state a cause of action against the demurring defendant. When a complaint is met by a demurrer on the ground that no cause of action is stated, the question always is, assuming every fact alleged to be true, whether enough has been well stated to constitute any cause of action whatever. If the facts alleged in the complaint justify a recovery, either at law or in equity, it cannot be held that the demurrer is well taken, although the pleading may be open to correction by motion or otherwise. It may be that in this case the facts are not stated in the complaint with that precision and in the logical order that is said to be requisite or desirable in good pleading. But there are facts enough alleged to entitle the plaintiff to a hearing in a court of justice. The pleading will be held to state all facts that can be implied from the allegations by reasonable and fair intendment, and facts so averred are traversable in the same manner as though directly and explicitly stated. *Zabriskie* v. *Smith,* 13 N. Y. 330, 64 Am. Dec. 551; *Marie* v. *Garrison,* 83 N. Y. 14, 23; *Sanders* v. *Soutter,* 126 N. Y. 193, 27 N. E. 263; *Sage* v. *Culver,* 147 N. Y. 241, 41 N. E. 513.

The plaintiff was an infant, and by his guardian *ad litem* brought the action against Wheeler, the principal defendant; the other party named as defendant, so far as appears, having taken no part in the litigation. The complaint states the following facts: (1) That the plaintiff's father died in this state in January, 1884, leaving a last will and testament, by which he devised and bequeathed to the plaintiff the residue of his estate after the payment of debts; that the will was thereafter proved and established before the surrogate as a valid will of real and personal property. (2) That the testator was at the time of his death the owner in fee of one undivided fifth part of a piece or parcel of land in the state of Colorado, known as the "Emma Mining Claim," and was the owner of an undivided two-thirds part of a lease for one year from November 20, 1883, of the remaining undivided four-fifths of said mining claim, and that one Nevitt was the owner of the other undivided third part of said lease. (3) That on or about the 10th day of March, 1884, the defendant Wheeler became the owner in fee of the said undivided four-fifths of said mining claim, subject to the said lease, and that in May following, he, by some arrangement with Nevitt, the exact nature of which is unknown to the plaintiff, took possession of the mining claim, and worked the mine thereon, and thereafter took and removed from said mine a large quantity of mineral, amounting to the value of upwards of $700,000, and sold the said mineral, and received therefor for the plaintiff's use upwards of $250,000; and that said defendant, although duly requested, has failed and refused to account to the plaintiff for the moneys so as aforesaid received by him for the plaintiff's use, and has wholly refused and failed to transfer to the plaintiff any portion thereof. (4) The complaint then alleges the appointment of a guardian *ad litem* by the court, and demands judgment that the defendant Wheeler account for the mineral taken from the mine, and pay to the plaintiff his proportion thereof, or

for such other or further relief as may be just. These facts, admitted by the demurrer, entitle the plaintiff to relief of some kind. It may very well be that the interest of the testator in the lease was personal property; and passed to his executor under the will, so that the plaintiff would not be entitled to maintain any action in his own behalf based upon any right accruing under the lease. But it will be seen that the plaintiff also alleges an interest in the realty with the defendant. He claims to be owner, under his father's will, of an undivided one-fifth part of the mine. The rule of the common law which protects a tenant in common in possession of the estate from an action by his co-tenant to recover for use and occupation, or rents and profits, or annual products, has no application to this case. The question in this case is whether one tenant in common, who has taken possession of the real property, the subject of the tenancy, the value of which consists substantially, if not entirely, in the mineral deposits, can extract all the mineral, and thus deplete the property, for his own exclusive benefit, without any liability whatever to account to his co-tenant for the spoliation. The complaint in this case states that the defendant has severed from the estate, and appropriated to his own use, the minerals, which constitute its principal value; and hence the action is not in any proper sense to recover for use and occupation, or for rents and profits, or annual products, but for a part of the estate itself which the defendant has taken and carried away. We think that the right of the plaintiff to maintain an action under such circumstances against the defendant is no longer open to question in this court. *Cosgriff* v. *Dewey,* 164 N. Y. 1, 58 N. E. 1; *Knope* v. *Nunn,* 151 N. Y. 506; 45 N. E. 940, 56 Am. St. Rep. 642; *Cosgriff* v. *Foss,* 152 N. Y. 105, 46 N. E. 307, 36 L. R. A. 753, 57 Am. St. Rep. 500; *McCabe* v. *McCabe,* 18 Hun, 153; *Davis* v. *Lottich,* 46 N. Y. 393; Code Civ. Proc. § 1656.

The case of *Marvin* v. *Brooks,* 94 N. Y. 71-80, decides

nothing adverse to this view. In that case it was held that an action for an accounting was maintainable upon the facts. It is true that the learned judge who gave the opinion, after reviewing several authorities, which were found to be somewhat conflicting, stated certain principles which he considered as established by the best review of the authorities. The discussion of the question, with respect to the circumstances under which an action for an accounting may be maintainable, is not open to any criticism whatever, but what was said upon that subject does not necessarily exclude the right to maintain an action upon the facts disclosed by the present record. The question in that case did not rest, as it does here, upon a demurrer, where all the facts are admitted, but upon a decision of a referee in favor of the defendant. It was evidently decided in that case at the trial that the plaintiff could not maintain the action, but this court reversed the judgment and granted a new trial. It would, I think, be difficult to show how the decision in that case is at all adverse to the right of the plaintiff to maintain this action.

My conclusion, therefore, is that the second appeal should be dismissed, with costs in all courts; that the judgment of the general term should be reversed upon the first appeal, and that of the special term affirmed, with costs, but with leave to the defendant to answer within 20 days upon payment of costs. But my Brethren, while agreeing with me upon the merits, do not agree with me in regard to the question of practice. They think that the reversal with costs should be upon the second appeal, and that the first appeal should be dismissed, with costs.

GRAY, MARTIN, VANN, CULLEN, and WERNER, JJ., concur. PARKER, C. J., not sitting.

Ordered accordingly.

WILLIAM LARNED v. JOHN C. JENKINS.

(113 Federal 634. Circuit Court of Appeals, Eighth Circuit. March 3, 1902.)

[1]**Cannot follow lode on strike beyond side lines.** One who discovers and locates a lode mining claim under the act of 1866 thereby renounces and abandons all rights and privileges to follow his lode on its course beyond the exterior lines of his patented claim, when he locates it upon the surface of the ground, enters it, and accepts a patent for it under the law.

Locator cannot follow vein beyond his boundaries on its strike. The act of July 26, 1866, does not grant to the patentee of a lode mining claim the right to follow on its strike his vein, with its dips, angles, and variations, beyond the boundaries of his location. It permits him to follow it beyond those boundaries on its dip or descending course only.

[2]**It is mines known to exist at the time a town-site patent is issued** and those only, that are excepted from its grant by section 2392 of the Revised Statutes.

The town-site deed impervious to collateral attack. The deed of the city authorities authorized to convey lots in a town site is presumptively valid, and it cannot be collaterally assailed in an action at law for a failure of the authorities to require the preliminaries or perform the requirements antecedent to its execution.

Estoppel. Adverse claim creates none against ejectment based on prior title. An action of ejectment based upon a patent issued prior to the initiation by the defendant of a mining claim for which he has applied for a patent is not inconsistent with a claim adverse to that application, under section 2326 of the Revised Statutes, and such adverse claim does not estop the plaintiff from maintaining his action.

(Syllabi by the Court.)

In Error to the Circuit Court of the United States for the District of Colorado.

See 109 Fed. 100.

[1]*Wolfley* v. *Lebanon Co.* 13 M. R. 282.

[2]*Bonner* v. *Meikle*, 19 M. R. 83. *Regan* v. *Whittaker*, 21 M. R. 309.

This is an action of ejectment. The court below rendered a judgment for the plaintiff on a demurrer to the answer of the defendant. The writ of error challenges this judgment. The property in controversy is an irregular tract of land adjoining the Cook lode mining claim on the north, and it has a length of 357 feet on one side and 283 feet on the other, and a width of 25 feet on one end and 101 feet on the other, measured upon the diagonal lines which form its ends. This tract of land was patented to the city of Central on July 10, 1876, as a part of its town site, was subsequently vested in its successor, the city of Blackhawk, and that city on September 9, 1897, conveyed it to the plaintiff, John C. Jenkins. He set forth this chain of title in his complaint, alleged that the defendant had wrongfully entered upon the premises; that this action was brought in support of an adverse claim filed in the land office against the entry of this land by the defendant, William Larned; that he had disbursed $30 for plats, abstracts, and copies of papers, and $50 for a counsel fee, in preparing his adverse claim; and he demanded judgment for the possession of the premises, $1,000 damages, and $80 expended in support of the adverse claim. The answer of the defendant is voluminous, but, so far as it relates to any errors assigned in the action of the court below, this is the state of facts which it presents: The patent to the town site and the conveyance under which the plaintiff claims were made as he alleges. On October 8, 1870, a patent was issued to the Cook lode, which grants a territory 790 feet in length by 50 feet in width, adjoining the tract here in dispute on the south. The Cook vein for the distance of about 120 feet deflects on its strike from the north side line of the Cook mining claim into the tract of land here in controversy, but the deflection of the apex from the north line of the Cook claim does not exceed 7 or 8 feet, and the dip of the vein is at all points slightly to the south, so that where it is deflected from the Cook claim it enters it on its dip 15 or 20 feet below the surface of the ground. Six shafts were sunk, which exposed this vein within the patented territory of the Cook mining claim, and there was a well-known mine thereon before the patent of the disputed territory to the city of Central was issued. This disputed territory was mineral land of great value, and known to be of great value, and there was in fact a mine of gold-bearing quartz, whose top or apex was partly within and partly without this tract, when the patent to the city of Central was issued. In the year 1871 the patentee of the Cook lode mining claim conveyed it to the defendant. On June 7, 1897, one William Rogers discovered a vein of gold on the tract of land in controversy, located a mining claim thereon, called the "Cook No. 2 Lode," applied to the city of Blackhawk to be allowed to purchase the land before the deed therefor was issued to the plaintiff, and

on July 14, 1897, conveyed this mining claim to the defendant. The defendant thus holds a deed from the grantee of the Cook lode mining claim, patented in 1870, and another from the locator of the Cook No. 2 lode mining claim, which was located in June, 1897. The court below held that the town-site patent and the deed under it to the plaintiff must prevail over the title which the defendant pleaded, and this is the ruling which is challenged as error.

WILLARD TELLER and HARPER M. ORAHOOD, for plaintiff in error.

JACOB FILLIUS and R. S. MORRISON, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The title of the defendant in error Jenkins consists of a patent to the city of Central, and a regular conveyance from its successor, the city of Blackhawk, to himself. On its face this title is regular and sufficient. Counsel for the plaintiff in error assail it on the grounds (1) that the patent to the city of Central was void and ineffectual to convey this property, because it was reserved from conveyance as a part of a town site, under sections 2386, 2392, Rev. St.; and (2) because the conveyance from the city of Blackhawk was made to Jenkins while Rogers, the grantor of the plaintiff in error, was in possession of the property, and entitled to the deed from the city.

The provisions of sections 2386 and 2392 relevant to this issue are that "where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof," and that "no title shall be acquired under the foregoing provisions of this chapter to any mine of gold,

silver, cinnabar or copper; or to any valid mining claim or possession held under existing laws."

Prior to the issue of the patent to the town site the grantor of the plaintiff in error had located his claim to the Cook lode upon a tract of land 790 feet long and 50 feet wide, had marked the exterior boundaries of this claim, had entered it and received a patent for it. These acts constituted a notice to the government and to the public that he was the owner of all the exclusive rights and privileges in this tract of land, and in the lode or vein therein, granted by the act of July 26, 1866, under which he located and entered the land. But it was also a notice, and a legal notice, to the government and to the public that he renounced and abandoned all other rights and privileges pertaining to the discovery of his lode which he did not secure by his patent. When he had discovered his vein, he had the right to locate it, in conformity with the local laws, customs, and rules of miners, upon that portion of this vein which is within the tract conveyed to the city of Central. Until he made his location he was entitled to follow the course of the vein. He chose to locate his claim and to take his patent upon a tract which excluded that portion of the lode within the territory now in dispute. His grantee now asks to renounce this location, and the limitations of the law and of the patent upon which it is based, and to follow the lode wherever it leads, as the discoverer might have done before he located and marked the boundaries of his claim. The action of his grantor has forever estopped him from pursuing this course. A discoverer of a vein cannot be permitted to locate his claim, present his diagram, and obtain a grant for the lode and the land he claims, and then disregard the limitations of the grant and follow the lode without his location wherever it happens to lead. One who discovers and locates a lode mining claim under the act of 1866 thereby renounces and abandons all rights and privileges to follow his lode on its course beyond the exterior lines

of his patented claim, when he locates it upon the surface of the ground, enters it, and accepts a patent for it under the law. *Mining Co.* v. *Old,* 79 Fed. 598, 606, 25 C. C. A. 116, 124, 49 U. S. App. 201, 213, 214; *Wolfley* v. *Mining Co.,* 4 Colo. 112, 116; *Mining Co.* v. *Rogers,* 8 Colo. 34, 38, 5 Pac. 661.

The position of counsel for plaintiff in error, that because the act of 1866 permits the discoverer of a lode to receive a patent therefor, "granting such mine together with the right to follow such vein or lode with its dips, angles and variations to any depth although it may enter the land adjoining," the locator has the right to follow the lode on its strike beyond the boundaries of his location, is not tenable. It is only in its descending course that he may follow its dips, angles, and variations. He cannot follow these dips, angles, and variations "to any depth" on the strike of the vein, or on its ascending course. The words "to any depth," as well as the other provisions of the statute which require the locator to file a diagram of the tract he claims, and permit him to receive a patent of this limited area, demonstrate the fact that it was not the intention of congress to grant to the patentee of a lode mining claim under the act of 1866 the right to follow it on its strike beyond the boundaries of the location he selects and secures. The act of July 26, 1866, does not grant to the patentee of a lode mining claim the right to follow his vein on its strike, with its dips, angles and variations, beyond the boundaries of his location. It permits him to follow it beyond those boundaries on its dip or descending course only. The result is that Lyman Cook, the patentee of the Cook lode, derived no title or interest in the land here in dispute by his patent, and the plaintiff in error has taken none through Cook's deed.

It is insisted, however, that, if this be true, the patent to the city of Central conveyed no title to this property, because it was reserved from conveyance by the patent as a mine by

the sections of the statute to which reference has been made. But it is only mines of gold, silver, cinnabar, or copper which are known to exist at the time of the issue of the town-site patent and mining claims and possessions then lawfully existing that are reserved from patent by section 2392. *Davis* v. *Wiebbold,* 139 U. S. 507, 518, 526, 527; *Dower* v. *Richards,* 151 U. S. 658, 663; *Smith* v. *Hill,* 89 Cal. 122, 125, 26 Pac. 644; Lindl. Mines, § 175B, p. 216. There is no allegation in the answer in this case that there was any known mine upon the tract here in dispute at the time when the patent to the city of Central was issued. On the other hand, the fact that Lyman Cook, the discoverer of the Cook lode, renounced all claim to this property, and had excluded it from his location and patent, before the grant to the city was made, and the fact that there was no mining claim or possession of this disputed tract in existence at the time the town-site patent was issued, clearly indicate that no mine was then known to exist upon it. The argument of counsel that, because there was a discovery and possession of the Cook lode at places within the limits of the Cook location, that lode and mine were known to exist outside of that location and in this disputed territory, is not persuasive. Indeed, the diagram of his location which Cook made, and the patent which he received, conclusively show that Cook's lode and mine were not known or believed to pass without the north line of the tract he patented, on its strike into this land which he abandoned. Nor was there any possession of this mineral vein within the tract here in controversy which could limit the grant of the patent under the provisions of section 2386. It is only a possession of mineral veins recognized by local authorities, and only to the extent so possessed and recognized, that the title to town lots is subject to under that section. And the answer, the location and patent of Cook, conclusively show that the extent of the possession of this vein recognized by local authorities and by Cook himself

was the possession of it within the limits of his patented claim. There was neither possession, nor recognition of possession of it without those limits. There was therefore no exception or limitation of the grant of this land under the patent of the town site by any of the provisions of sections 2386 and 2392.

But it is said that even if the patent conveyed the title to this property to the city of Central and its successor, the city of Blackhawk, the conveyance of the latter to the defendant in error was void, because the property was not appraised and sold at public auction, as required by sections 4339 and 4342 of Mills' Annotated Statutes of Colorado, and because the grantor of the plaintiff in error, William Rogers, who took possession on June 7, 1897, and applied for a deed to himself, was entitled to the conveyance from the city of Blackhawk, while the defendant in error had no right to it. The power and duty of the city of Blackhawk to dispose of this land, however, are not governed by the sections of the statute to which reference has been made, which were first enacted in 1881. They were controlled, on the other hand, by a special act of the legislature of the state of Colorado, approved February 1, 1876, which may be found in the Laws of Colorado for that year, at page 175. This act empowered the mayor of the city of Central, with the consent of its council, to sell any unsold lots in the town site at private sale, under certain circumstances, and nowhere required the city authorities to give a preference in the purchase to those who entered upon the possession of the property subsequent to the issue of the patent. No violation or disregard of the terms or limitations of the trust imposed upon the city is therefore disclosed by the pleadings, and the deed to the defendant in error is not invalid.

Moreover, the questions whether or not the city authorities complied with the terms of the statutes prescribing the preliminaries, and declaring the method for a conveyance

of the lots in the town site, and whether or not on that account its deed may be avoided, cannot be considered in this action of ejectment. Whether the deed was executed after compliance with the required preliminaries, and in strict accordance with the requirements of the statutes, or not, it conveyed the legal title to this property to the defendant in error. The statutes of Colorado intrusted to the authorities of the city the power to hear and determine the questions whether or not these preliminaries had been performed and these requirements had been fulfilled, and authorized them, upon that determination, to make the conveyance. The legal presumption is that they discharged these duties honestly and in accordance with the provisions of the law. That presumption might undoubtedly be overcome in a suit in equity by pleading and proof of gross mistake, fraud, or error in law. No such proceeding has been instituted. No suit to attack or avoid this deed has been brought. This is an action at law, and in this action the defendant in error had a right to rely upon his conveyance. It cannot be collaterally attacked in this action of ejectment. The deed of the city authorities authorized to convey lots in a town site is presumptively valid, and it cannot be collaterally assailed in an action at law for a failure of the authorities to require the preliminaries or perform the requirements antecedent to its execution. *Chever* v. *Horner,* 11 Colo. 68, 71, 79, 17 Pac. 21, 7 Am. St. Rep. 202; *Smith* v. *Pipe,* 3 Colo. 187, 199; *Anderson* v. *Bartels,* 7 Colo. 256, 263, 266, 267, 3 Pac. 225.

Finally it is contended that the defendant in error is estopped from claiming that he is the owner of this land under the patent of the town site, and that it was not subject to entry as a mining claim on June 7, 1897, because he has pleaded in his complaint that this suit is brought in support of an adverse claim filed in the land office against the entry of this land for patent by the plaintiff in error under section

2386 of the Revised Statutes. But there is nothing inconsistent in the adverse claim of Jenkins and this action of ejectment. The statutes permit any one to file an adverse claim whenever application is made to enter a mining claim upon the public lands for patent. If an attempt is made to secure a patent to land which has already been conveyed by the government, the land department has no jurisdiction to consider or determine the questions it presents. An adverse claim presented to that department which discloses the fact that the adverse claimant holds it under a patent already issued is entirely consistent with an action of ejectment, based upon that patent, to turn the trespassing claimant out of possession. Not only this, but section 2326 of the Revised Statutes, under which the adverse claim is prosecuted, requires the claimant to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and to prosecute the same with reasonable diligence to final judgment. The averments of the complaint base the claim of the defendant in error upon the patent of the town site issued in 1876. That pleading contains no averment or intimation of any concession or claim that the disputed property was a portion of the public domain, and subject to the disposition of the land department, after the issue of the patent to the city of Central. The only unwarranted averment in that pleading is the allegation of the expenses of preparing and presenting the adverse claim, and the most that can be said of this is that it is immaterial. No relief was granted on account of it, and there is nothing in the pleadings, the proceedings, or the judgment inconsistent with the claim and recovery of possession by the defendant in error upon the patent of the town site in 1876. An action of ejectment based upon a patent issued prior to the initiation by the defendant of a mining claim for which he has applied for a patent is not inconsistent with a claim adverse to that application, under

section 2326 of the Revised Statutes, and such adverse claim does not estop the plaintiff from maintaining his action.

The result is that the patent of the town site conveyed the title to this land to the city of Central and its successor, the city of Blackhawk, and the conveyance of the latter vested it in the defendant in error. The deed of Lyman Cook conveyed no title or interest in this property, because he had none. The attempt of William Rogers to initiate a mining claim upon it in 1897 was futile, because all right, title, and interest in it had passed out of the government in 1876. His conveyance to the plaintiff in error, therefore, was ineffectual, and the judgment below must be affirmed.

It is so ordered.

EMPIRE STATE-IDAHO MINING & DEVELOPING CO. v. BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO.

(114 Federal 417. Circuit Court of Appeals, Ninth Circuit. March 3, 1902.)

[1]**Extent of review of findings of law and fact.** It is settled law in the federal courts that, where an action at law is tried to the court, its findings upon questions of fact are conclusive, and that the only matters reviewable in the appellate court are the rulings on questions of law, when properly presented by bill of exceptions, and, when special findings are made, whether the facts found are sufficient to sustain the judgment.

[2]**Locations on wide vein each enclosing only part of the width of the apex.** Two adjoining claims were located at different times with a common side line which ran along the center of the apex of a very wide lode so that practically the north half of the apex of the vein was covered by one and the south half by the other: *Held* that the prior location took so much surface as it covered and the whole vein on its dip between its end lines protracted and the later location took what surface it covered and the whole of the vein after it ceased to be enclosed within the protracted end lines of the prior location.

[3]**Extralateral rights** of a lode mining claim apply only to what is beneath the surface, and never operate to enlarge surface rights which, under the statute, are limited to 300 feet in width on each side of the center of the ledge or lode.

In Error to the Circuit Court of the United States for the District of Idaho.

For opinion below, see 106 Fed. 471.

W. B. HEYBURN and E. M. HEYBURN, for plaintiff in error.

[1]*Republican Co.* v. *Tyler Co.* 18 M. R. 564.
[2]*Larkin* v. *Upton*, 17 M. R. 465.
[3]*Larned* v. *Jenkins*, 22 M. R. 94.

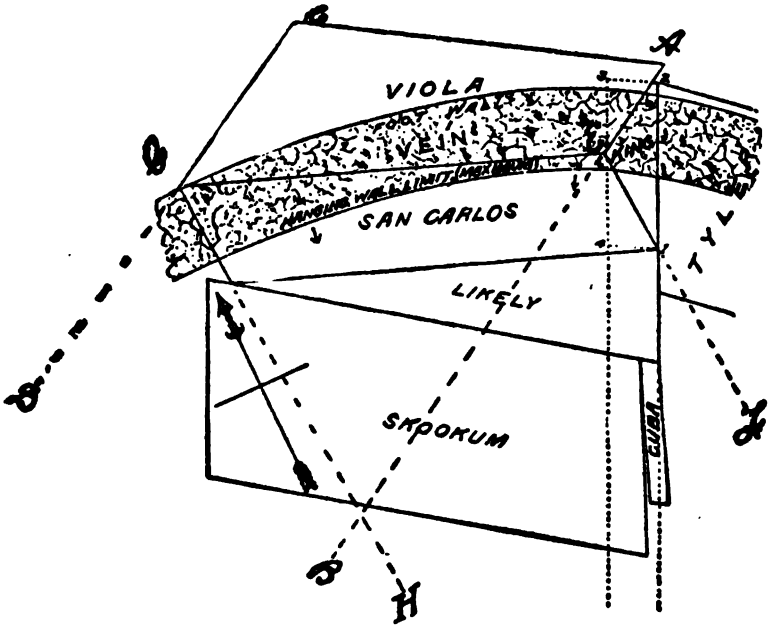
CURTIS H. LINDLEY and JOHN R. MCBRIDE, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was an action of ejectment, in which the defendant in error was plaintiff in the court below, brought for the recovery of certain underground portions of a vein or lode alleged to have its apex within the surface lines of a mining claim called the "King," which vein or lode, it is alleged in the complaint, in its course crosses the end lines of that claim. The incidental question of damages, for which the plaintiff also sued, has been, by stipulation of the respective parties, withdrawn from present consideration. The case was tried without a jury, and resulted in certain findings of fact made by the court, and a judgment thereon in favor of the plaintiff to the action. The record contains a bill of exceptions embracing among other things, various assignments of error, the 2d, 3d, 4th, and 5th of which are to the effect that the trial court erred in making certain of its findings of fact, which findings of fact so complained of these assignments of error respectively set out at large. The 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, and 20th assignments of error are to the effect that the court below erred in refusing to make certain findings of fact requested by the defendant to the action. It is very clear that these assignments are unavailing. Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive in the appellate court. Only rulings upon matters of law, when properly presented in a bill of exceptions, can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment rendered. *Stanley* v. *Supervisors,* 121 U. S. 535, 547, 7 Sup. Ct. 1234,

30 L. Ed. 1000; *Distilling & Cattle Feeding Co.* v. *Gottschalk Co.*, 13 C. C. A. 618, 66 Fed. 609; *Cable Co.* v. *Fleischner*, 14 C. C. A. 166, 66 Fed. 899; *Consolidated Coal Co. of St. Louis* v. *Polar Wave Ice Co.* 45 C. C. A. 638, 106 Fed. 798.

The remaining assignments of error embodied in the record relate to the question of the sufficiency of the findings of fact made by the court below to sustain the judgment given by it, which is the real, and, indeed, the only question in the case. Annexed to the opinion of the court below, as illustrative of its views, is the following diagram:



It appears from the findings that the defendant to the action (the plaintiff in error here) is the owner of the Viola mining claim, located February 20, 1886, and patented April 13, 1895; the San Carlos, located April 24, 1886, and

patented April 22, 1895; the Skookum, located April 5, 1886, and patented August 10, 1891; the Likely, located April 24, 1898; and the Cuba, located May 7, 1898,—neither of which last two have been patented. The King, according to the findings, was located June 22, 1898, and is owned by the defendant in error (plaintiff in the court below). The ore bodies in controversy, and which were awarded to the defendant in error by the judgment of the court below, lie beneath the surface of the Likely, Skookum, and Cuba claims. As these three claims are also, according to the findings, the property of the plaintiff in error, prima facie the ore bodies in question belong to it. *Cheeseman* v. *Shreeve* (C. C.) 37 Fed. 36; *Mining Co.* v. *Murray* (Mont.) 23 Pac. 1022. They are also embraced by vertical planes drawn down through the end lines of the San Carlos claim, extended in their own direction, which claim has been patented by the government, and is also owned by the plaintiff in error. The court below held that the King claim, which was not located until long subsequent to all of the others mentioned, was so located as to entitle its owner to the underground bodies of ore found under the surface of the Likely, Skookum, and Cuba, and within the end line planes of the San Carlos, extended in their own direction. At the time of the location of the King claim the only unappropriated piece of surface ground in the vicinity, according to the findings, was the triangular piece lying between the Tyler claim and the Viola and San Carlos. The same vein or lode of mineral bearing rock that outcropped in the Viola, San Carlos and Tyler outcropped in this triangle, and it was therefore open to location, subject, of course, to all pre-existing rights. In making the location of the King, the entire westerly and southerly lines, and almost all of the northerly line, were laid within the patented claims of the plaintiff in error, all of which was done, according to the findings of the court below, "without the consent or knowledge of the owners

of said Viola and San Carlos lode claims." And the contention of the plaintiff to the action, which was sustained below, was, and here is, that lines so laid (being otherwise also in accordance with law) confer extralateral rights upon the locator as against the owner of the patented ground so entered upon. It is the settled law that, for the purpose of acquiring the extralateral rights conferred by statute, a locator may place his lines on a prior mining location with the consent of such prior locator, or, when it is done openly and above board, without objection on his part (which in reality constitutes consent); and perhaps the same thing may be done on patented claims, where the lines are established openly and peaceably. It was so held by the secretary of the interior in the case of the Hidee Gold Mining Company (decided January 30, 1901). But it is equally well settled that no such right can be acquired by any forcible, fraudulent, or clandestine entry upon the possession or ownership of another. *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.,* (C. C. A.) 112 Fed. 17; *Cowell* v. *Lammers,* (C. C.) 21 Fed. 202; *Nevada Sierra Oil Co.* v. *Home Oil Co.* (C. C.) 98 Fed. 680; *Hosmer* v. *Wallace,* 97 U. S. 579, 24 L. Ed. 1130; *Mower* v. *Fletcher,* 116 U. S. 385, 29 L. Ed. 593; *Nickals* v. *Winn,* 17 Nev. 188, 30 Pac. 435; *McBrown* v. *Morris,* 59 Cal. 72. Under which of these conditions the findings of the court below place the entry of the King locator upon the patented claims of the plaintiff in error need not be determined for the reason hereinafter appearing.

The findings and diagram annexed to the opinion of the court below show that the vein or lode in question is a very wide one, and crosses both end lines of each of the plaintiff in error's patented claims, Viola and San Carlos, the common side line of these two claims being entirely on the vein or lode. The Viola, being the older of the two locations, would, under the doctrine of *St. Louis M. & M. Co.* v. *Montana M. Co.,* 44 C. C. A. 120, 104 Fed. 664, and like decisions there

cited, be entitled, in the pursuit of its extralateral rights, to the entire width of the vein underground within its bounding planes. But extralateral rights apply only to what may be found beneath the surface within the limits fixed by the statute, and never operate to enlarge or contract surface rights. Surface rights are limited by the statute to 300 feet in width on each side of the center of the ledge or lode, yet such ledge or lode may extend beyond such side lines, and, in the case at bar, did extend southerly of the southerly side line of the Viola claim, and into unappropriated public land. The locator of the San Carlos claim, finding it outcropping there, made the San Carlos location upon it, as he had the right to do, and as the government recognized by issuing its patent in confirmation thereof. The ledge or lode crossing both of the end lines of that claim, the extralateral rights conferred by the statute thereupon arose, subject, however, to the extralateral rights of the prior Viola location, which were, as all such rights are, confined between vertical planes drawn down through its end lines, extended indefinitely in their own direction, which gives to the Viola, as against all of the claimants here appearing, the underground portion of the vein or lode on its dip between vertical planes drawn down through the lines A E and C G of the diagram, extended indefinitely in their own direction. But where the prior extralateral rights of the Viola cease, namely, at the line E B of the diagram, those of the next locator—that is to say, the locator of the San Carlos—commence, and embrace that portion of the dip of the vein or lode not included within the rights of the Viola, and embraced within vertical planes drawn down through the end lines of the San Carlos extended indefinitely in their own direction. These lines include the ore bodies in controversy. They were therefore not subject to inclusion by the extension of the end lines of the subsequent location of the King claim, even if it be conceded that

its lines were so laid as to entitle its locator to extralateral rights.

The judgment is reversed, and cause remanded to the court below, with directions to enter judgment for the defendant on the findings.

THE HEWITT IRON MINING CO. v. THE DESSAU CO. ET AL.

(129 Michigan 590; 89 N. W. 365. Supreme Court. March 4, 1902.)

Thorough prospecting with some, but very slight, finding of ore held sufficient proof of exhausted mine and that the lessee was not bound to pay royalty on ore not to be got in the mine.

A lessee is not bound to rob the pillars to find ore.

A lien on ore attempted to be reserved by terms of the lease is not binding against a purchaser of the ore.

Retaining equity jurisdiction. On a bill to enforce a lien there being no suggestion that when suit was brought the property was not in existence or within reach of the decree, equity will retain jurisdiction and give personal judgment although the ore sought to be liened may have been sold and shipped.

Appeal from Circuit Court, Dickinson County, in chancery; JOHN W. STONE, Judge.

Bill by the Hewitt Iron Mining Company against the Dessau Company and another to enforce a lien on ore for royalty, and for taxes which defendants failed to pay. From a personal decree in favor of complainant, defendant company appeals. Modified.

GEORGE HAYDEN and JAMES C. WOOD (DAN H. BALL and E. A. WOODARD, of counsel), for appellant.

It is a defense to a covenant to take out a minimum tonnage to show that the ore did not exist in the mine. *Bannan* v. *Graeff*, 186 Pa. 648; 40 Atl. 805. *Diamond Iron Co.* v. *Buckeye Co.* 19 M. R. 197. *Blake* v. *Lobbs Estate*, 18 M. R. 462. *Ridgely* v. *Conewago Co.* 53 Fed. 988. *Contra.* *Wharton* v. *Stoutenburg*, 46 N. J. L. 151. *Timlin* v. *Brown*, 158 Pa. 606; 28 Atl. 236.

Construction of lease with the holding that the exhaustion of the ore relieved from the covenant to pay rent. *Boyer* v. *Fulmer*, 176 Pa. 282; 35 Atl. 235. Distinguishing *Timlin* v. *Brown*, *supra*, where the tenant was held.

A lease on royalty presupposes the existence of ore to be mined. *Brooks* v. *Cook*, 22 M. R. —.

COOK & PELHAM, for appellee.

HOOKER C. J. The Hewitt Iron Company, being lessee of the property involved in this litigation, sublet the same to the Millie Iron Company, which in turn assigned its sublease to the defendant. The term for which the property was sublet ended June 29, 1899. In October, 1896, an agreement was made between the Hewitt Iron Company and the defendant modifying the sublease under which the defendant then occupied the premises. The lease under which the Hewitt Company sublet, the sublease, and the agreement modifying the latter, all terminated on June 29, 1899. Previous thereto, and on October 26, 1896, the owners of the fee executed a lease to the defendant, covering the same premises, for the period of 20 years from and after June 29, 1899.

The lease and modification thereof under which the Dessau Company occupied the property provide that a royalty of 35 cents per ton of 2,240 pounds should be paid on all Bessemer iron ore containing 57 per cent. and over of metallic iron, and, on all non-Bessemer ore containing 57 per cent. and over of metallic iron, 25 cents per ton of 2,240 pounds; that there should be mined in each year such quantity of these ores as will, at the royalty thereon, yield $3,500 per annum; that, in case it shall not remove such quantities, it shall nevertheless pay $3,500 per annum; that all royalties for ore not mined shall be payable at end of year, except for the portion of 1899 between January 1st and June 29th of said year, which shall be payable at the expiration of sublease; that second party shall not remove or impair any supports placed in the mines, nor any timber or framework necessary to the use and maintenance of shafts or other approaches to the mine, nor any tramways within the mine; that second party shall open, use, and work said mines in such manner only as is usual and customary in the skillful and proper mining operations of similar character when conducted by

the proprietors themselves, and so as not to do, cause, or permit any unnecessary or unusual permanent injury to same, or inconvenience or hindrance in the subsequent operations of the same mine, and in the working of said mine; that the royalties reserved shall be treated as rent; that second party shall have the right to remove through the shafts on the premises leased any ore mined from adjoining premises, called the "Chapin Mine," without charge by first party, so far as it becomes necessary in the mining of ore from premises in sublease; that first party reserves, and shall at all times, have, possess, and hold, a lien upon all ores mined and on all improvements made on said premises by second party, as a security for any unpaid balance of money due under this contract,—such balance being deemed and to be treated as balance of purchase money—and which lien may be enforced against such property in like manner as liens conferred by chattel mortgages are or may be entitled to be enforced under the laws of the state of Michigan.

The royalties provided by these writings appear to have been regularly paid, with the exception of the amount provided to cover the six months ending June 29, 1899, although it is claimed that the defendant had not succeeded in taking out sufficient ore at any time to amount, at the rate fixed, to the prescribed payments. Not having paid anything for the last six months of the term, the bill in this cause was filed to enforce a lien upon the ore on hand and improvements for such royalty, and for taxes which defendant had failed to pay. The defenses relied upon are:

1. That ore assaying 57 per cent was exhausted, and therefore the defendant was not liable for a royalty.

2. That the only ground of equity jurisdiction was the enforcement of a lien, and that, as both the property and the owner of the same were not in this state, the court acquired no jurisdiction to render a personal decree against the defendant for its indebtedness.

The learned circuit judge held that the tools, machinery,

etc., placed upon the premises by the sublessee did not constitute improvements, within the true meaning of that word as used in the instrument, and therefore that there was no lien upon anything but the ore mined upon the premises, and that at the time the suit was commenced all such ore had been sold and shipped out of the state. He was of the opinion that the defendant failed to prove that the ore was exhausted, and found it indebted for the minimum royalty prescribed, for the six months ending with the term, and held that the court had jurisdiction to enforce a lien of this description by a suit similar to one appropriate to foreclose a chattel mortgage; that suits of that nature are transitory, and not local, and jurisdiction exists wherever service can be had on the defendant, irrespective of the locality of the property; that where the property is not within the jurisdiction the rights of the purchaser will not be affected, but that the court may, as between the mortgagor and mortgagee, where both are within its jurisdiction, adjudicate and determine the lien, and the amount of it; and that the removing and selling of the property does not destroy the lien. A personal decree was rendered against the defendant in favor of the complainant for the amount claimed, and the defendant has appealed.

We have endeavored to critically weigh the testimony on the first question, and have, with some hesitation, reached a different conclusion from that of the circuit judge. During the last six months of the term but a small amount of ore was taken out. Prospecting has continued since, with unsatisfactory results; no ore in paying quantities having been found. The diamond drill has been freely used, to little purpose. Stress is laid upon the fact that the defendant has been willing to continue its explorations, but this does not necessarily indicate more than a well-founded hope that the efforts may be successful. It should not be forgotten that defendant has operated under a new lease made two or three years before the lease in controversy ended, and when it was

regularly paying its royalties, and presumably doing a fair business, justifying its action in taking a new lease. There is nothing to lead to the inference of bad faith. For two years and a half since its sublease expired it has pursued its exploration with apparent diligence, but has failed to strike ore in paying quantities; and, to our minds, it seems improbable that it could have found ore that it could have mined profitably, during the last six months of its term, if there is any ore in paying quantities upon the premises. *Blake* v. *Lobb's Estate,* 110 Mich. 608, 68 N. W. 427. It may be said that it should have robbed the mine, by removing the pillars which support its roof; but we think it would not have been justified in doing that, under the spirit of its lease, which prohibits the removal or impairment of supports placed in the mines. The defendant admits that it took some ore from the mine during the period in question, royalties upon which amounted to $381.22. During the succeeding six months the royalties amounted to $623.62, and during 1900 they amounted to $138.60. These successes are not inconsistent with defendant's claim. They may be alluring and explain defendant's persistent hope, but they do not show that the ore has existed in paying quantities; and, if it did not, the fact that, in a fruitless search for paying ore bodies, the defendant found some ore, does not prove it.

The complainant is entitled to its decree for the royalty earned,—i. e., $381.22,—unless defendant's second point is a valid objection to any relief. In substance, it is that equity has no jurisdiction to entertain a suit upon a personal obligation, merely; that its only jurisdiction in this case is to enforce a lien, and, inasmuch as it appears that the property has been sold, the lien is discharged, and there is consequently no jurisdiction to enforce it. Again, it is said the proceeding is one *in rem,* aimed at the property, and where the mortgagor has parted with the equity of redemption he is not a necessary party, and inasmuch as the owner of the equity is

not before the court, and the property is beyond the jurisdiction, the court cannot make a decree affecting them, and cannot be used as a substitute for a court of law, to enforce a personal remedy against this defendant.

When this bill was filed it alleged the existence of property upon which complainant had a lien, within the jurisdiction, belonging to this defendant. The answer is silent upon the subject of the removal or sale of the property, and suggests no non-joinder of parties interested. On the contrary, it admits an indebtedness of $381.22, and offers to pay the same if the court shall find it due. It was not until the presentation of the defense upon the hearing that there was an intimation that the ore had been shipped away, and it is not shown to have been sold to a *bona fide* purchaser. The superintendent testified that it was shipped before August 1st, but did not know whether it had then been sold or not. The secretary testified that the ore was sold in January or February previous for the entire season. Under these circumstances, we think the court had jurisdiction to adjudicate the question of the lien between these parties, and to render a personal decree for the amount found due; and though it is manifest that such decree could not bind a prior purchaser of the property, if there be such, it might be conclusive between these parties, should any proceedings be taken in another jurisdiction to pursue this property as the property of this defendant.

The decree of the circuit court will be modified by reducing it in amount to the sum of $381.22, with interest from June 29, 1899, and in other respects it will be affirmed. The defendant will recover costs of this court.

MOORE, GRANT and MONTGOMERY, JJ., concurred.

LONG, J., did not sit.

JOHN S. SCOTT v. JAMES CROUCH ET AL.

(24 Utah 377; 67 Pac. 1068. Supreme Court. March 8, 1902.)

Fraud not proved. In a suit by the administrator of a deceased locator of a mining claim to declare that the patentee thereof is a trustee for the estate of the deceased, on the ground of fraud in procuring the patent, by presenting false affidavits averring that the original locator had conveyed his interest therein, evidence considered. and *held* to authorize a finding that such locator had conveyed his interest in the claim, and that therefore there was no fraud on the patentee's part in procuring the patent.

Burden of proof. A person alleging that a party holding the legal title to property is a trustee thereof has the burden of proving the trust.

[1]**Parol proof of lost deed.** Though a mining claim can only be conveyed by a deed in writing duly executed and delivered, the due execution and delivery of such a deed, which was not recorded, and which is lost, may be proven by parol testimony.

Slight proof sufficient after lapse of time. A party claiming title through a grantee in a lost and unrecorded deed will not be required, after the parties to the transaction are dead, or cannot be found, and after the lapse of several years without the grantor, or any one for or through him, claiming any interest in the property, to furnish the high degree of proof of the due execution and delivery of the lost deed that is generally required.

Facts amounting to laches. Where, in a suit by the administrator of a deceased locator of a mining claim to declare the patentee thereof a trustee for the estate of the deceased, on the ground that an alleged lost and unrecorded deed, conveying the locator's interest in the mine, was not executed, it appeared that the locator for over 15 years made no claim as owner thereof, and had knowledge of the claims of other persons who during such time worked the mine, the right of recovery was barred by the locator's laches.

The declaration of the locator of a mining claim that he had conveyed the property by deed, and had been paid therefor, is an admission against his interest, and admissible after his death.

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[1]Buyers of a mine had notice of an outstanding lost and unrecorded deed. They made enquiries and could get no definite information about it. *Held* on the facts of the case that when subsequently found and recorded it did not cut out their interests. *Tabor* v. *Sullivan*, 12 Colo. 136; 20 Pac. 437.

Appeal from District Court, Salt Lake County; W. C. HALL, Judge.

Suit by John S. Scott, as administrator of the estate of J. N. McCann, deceased, against James Crouch and others. From a decree in favor of defendants, plaintiff appeals. Affirmed.

FRICK & EDWARDS, for appellant.

BROWN & HENDERSON, for respondents.

MINER, C. J. The appellant, Scott, as administrator of the estate of J. N. McCann, deceased, filed his complaint against the defendants, and bases his claim for recovery upon the ground that the appellant's intestate during his lifetime was the owner of a one-tenth interest in the Zelnora mining claim, and that McCann died in 1886 seised of said interest therein, by virtue of having been one of the original locators thereof, and that he never parted with such interest. Respondent asserts title to one-tenth interest therein, based upon the claim that McCann in 1879 conveyed by deed his interest in said mining claim to one S. R. Dickson, and that they succeeded to said interest from Frank H. Dyer, through a United States marshal's deed to said Dyer, and by a quit-claim deed from him to Zelnora Hopper, and by her to the other respondents, James Crouch and Florinda Crouch. The record shows no deed of record from McCann to S. R. Dickson, except that in 1891 Zelnora Hopper applied for a patent to the Zelnora mining claim, and a patent was duly issued to her on June 23, 1892, by the United States government. The

Loss of papers is no excuse for laches. ***Curtis*** **v.** ***Lakin,*** **20 M. R. 35.**

A lost deed passes title on proof of its execution and delivery. ***Wetzstein*** **v.** ***Largey,*** **27 Mont. 212; 70 Pac. 717.**

plaintiff alleges in his complaint that at the time of the application for said patent the affidavits of Frank H. Dyer and Thomas Pells were presented to the receiver, in part as the basis therefor, wherein the appellant claims that Dyer falsely testified that said McCann in 1879 sold and conveyed his one-tenth interest in said claim to S. R. Dickson, and that he (Dyer) thereafter became the owner thereof by virtue of a marshal's deed under an order of sale duly made upon a judgment rendered in a proceeding wherein Dickson and others were defendants, and that Pells falsely testified that the statements contained in Dyer's affidavit were true; that the affidavits were falsely and fraudulently presented by said Zelnora Hopper to show that she was the owner of said Zelnora mining claim; and further alleges that she holds said title as trustee for plaintiff's estate, and not otherwise.

After hearing the testimony, the court, among other things, found that McCann was one of the owners of said mining claim, and owned a one-tenth interest up to 1879, when he executed and delivered a deed of all his interest to S. R. Dickson, who, with others, then entered into possession and worked the same, since which time McCann has had no interest therein; that in 1879 Thomas Pells, one of the locators of said claim, sold and conveyed to Dickson all his interest in said claim, and delivered a deed thereof; that Dickson failed to record said deed; that thereafter Dickson and others entered into possession of said claim, and performed the assessment work thereon until the claim was patented; that on the 7th day of February, 1881, Frank H. Dyer succeeded to all the interest of Dickson in said claim formerly owned by McCann, and other interests amounting to eight-tenths interest therein, through a deed executed by the United States Marshal on a valid judgment, decree, and sale in a suit wherein Dyer was plaintiff and S. R. Dickson, J. B. Ritchley, Zelnora Hopper, James Crouch, and P. K. Sheffield, were defendants, and that Dyer at once took posses-

sion thereof; that in August, 1897, Dyer and wife duly conveyed said claim to Zelnora Hopper; that in 1880 James Crouch and James B. Ritchley, the owners of two-tenths of said mining claim, duly conveyed said interest to Zelnora Hopper, and that by said conveyance said Zelnora Hopper became the legal and equitable owner of all of said claim; that in 1891 said Zelnora Hopper made application to the proper authorities of the United States for a patent to said mining claim, and, as part of the abstract record, she procured and filed the affidavits of Frank Dyer and Thomas Pells, testifying that in the year 1879 the said J. N. McCann and Thomas Pells had each, to their knowledge, sold to the said S. R. Dickson their, and each of their interests in said claim, and executed and delivered to said Dickson a deed of conveyance thereof; that all the development work thereon was done as required by law; that on the 23rd day of June, 1892, a patent was granted to Zelnora Hopper to all of said claim; that said affidavits were true, and were obtained without fraud; that from 1879 up to McCann's death, in 1886, he made no claim to any part of said claim, although he well knew that Dickson was in possession thereof with other owners, and was developing and performing assessment work thereon; that in 1892 Zelnora Hopper duly conveyed to James Crouch an undivided one-half interest in said claim, and in February, 1894, duly conveyed to Florinda Crouch the remaining undivided one-half of said claim, who are now the legal and equitable owners of the same; and that plaintiff has no rights therein. A decree was entered accordingly.

The plaintiff appeals, and claims that the evidence does not establish the fact and conclusion that McCann ever conveyed, or delivered a deed to Dickson, of his one-tenth interest in said claim. It is conceded that, if such deed was made, then the decree should be affirmed; if not, it should be reversed.

The evident theory of the appellant is that the legal title was all vested in the defendants, and that it was obtained

by fraud, through the act of Hopper in fraudulently obtaining the affidavits of Dyer and Pells used on the proceeding to obtain a patent from the United States. The affidavit of Dyer, used before the commissioner of the land office, and shown in evidence by the plaintiff, so far as material, reads as follows: "It is personally known by me that in the year 1879 J. N. McCann and Thomas Pells, who were two of the original locators of said Zelnora lode, conveyed by deed their undivided two-tenths interest, which they then owned in said lode, to the said S. R. Dickson, and said interest was then vested in him at the time of said judgment and decree, as shown by the findings and report of J. L. Rawlins, the commissioner appointed by the court to take evidence in said case, as well as by the judgment itself, a certified copy of which, with the order of sale, is filed herewith; that the said S. R. Dickson has evidently simply neglected to cause his said deed to be recorded; that he is believed now to be dead, or, if alive, he cannot be found, his whereabouts being unknown since the year 1880; that, in further support of my statement as to said deed to Mr. Dickson, I have to state that I acted for him in making the purchase of said interest of two-tenths in said lode." The affidavit of Thomas Pells, used on said hearing is as follows: "Also personally appeared Thomas Pells, of Bingham, Salt Lake county, Utah, who, being duly sworn, deposes and says that he has heard read the foregoing affidavit of Frank H. Dyer, and personally knows that the statements made therein as to the conveyance of said two-tenths interest of himself and J. N. McCann by deed to said S. R. Dickson are true, and, upon his best information and belief, all the other statements therein contained are also true, and that he has no interest now in said Zelnora lode."

Mr. Pells, the last-named affiant, was present in court and gave his testimony at the hearing of this case. He testified, in substance, that he knew the claim in question, and the parties; that in 1879 he sold and conveyed his interest in the

claim to Dickson, and executed and delivered to him a deed of the same; that at this time he knew McCann, and had talked with him about his interest in the Zelnora claim. He says: "He [McCann] told me that he had sold his interest to Mr. Dickson, through Mr. Dyer, and had made a deed. I think it was just after I had sold. He told me he got $50 for it. I got $50 for mine. After the sale, or about the time I sold that spring, I saw Mr. Dickson and Mr. Dyer at different times on that property. They were prospecting and opening up the mine; that is, running a tunnel, particularly. They were doing assessment work; had a tent up there on the property, and were living there. Mr. Dyer was stoping out ore and running a tunnel. He was working for Mr. Dickson. He had charge of the work for him and the other owners. After that I remember of hearing about a suit being commenced by Dyer to establish a lien on that property for the work. I heard of it afterwards, about the time it was brought; and Mr. McCann was living there in the community at that time. I was acquainted with the property, and saw it occasionally after that for some years. I know something about Mr. McCann working the property called the 'Rob Roy.' They are pretty well connected together. Their end lines come about together. I don't think they quite adjoin."

Mr. Taylor testified, in substance, that in 1885 he visited McCann before his death, while on the Rob Roy claim, which was situated near the Zelnora, for the purpose of incorporating some claims; that he could then see the Zelnora claim, and asked McCann who owned it; that McCann replied that it was the Hopper claim, and that it belonged to Hopper and Dyer; that McCann did not claim any interest in the Zelnora claim; that he pointed out the lines between the Zelnora claim and his claim. It also appears that, after the time Dickson purchased the Zelnora claim from McCann, he went to work upon it, and did development work thereon, and that McCann and Pells subsequent to this time did no work upon

it, but did work upon other claims in that vicinity for several years thereafter, and ran a tunnel 500 or 600 feet in connection with E. Rauch, a co-owner in other claims near the Zelnora. During all this period before McCann's death he made no claim to any interest in the Zelnora; neither did Mr. Rauch, who, after McCann's death, was appointed his administrator. The other parties owning the claim performed the assessment work upon it for several years, and no showing is made that McCann and Pells contributed anything towards such expense, or raised any objection to such occupancy or working by Dickson. These facts certainly raise the inference that the affidavits of Dickson and Pells are true.

So far as appears, the allegations of fraud upon which the complaint is predicated, and which should be shown by the plaintiff, have not been established by the testimony in the record. As stated, the legal title to the claim stood in the defendants. Under such circumstances, the burden was upon the plaintiff to show that they were not entitled to retain it, but held it in trust for the plaintiff. While it is true that a conveyance of a mining claim or other real estate cannot be made, except by deed in writing, executed and delivered, yet, when the deed is lost and cannot be found, such conveyance may be shown by such facts and circumstances as will clearly justify the conclusion that in fact it was so executed and delivered. Taking the testimony given with the decree, and the action of the land commissioner, coupled with the fact that neither McCann nor his administrator, since 1879, up to the time of the commencement of this suit, has made any claim or performed any labor upon the Zelnora claim, compels the conclusion that McCann conveyed to Dickson his interest therein, as testified to by Pells, Dyer, and Taylor, and that such interest subsequently vested in the patentee. This conclusion is strengthened by the fact that McCann was working an adjoining claim, and saw Dyer and Dickson performing assessment work upon the Zelnora, and during this time

stated that he had made a deed of his interest in the claim to Dickson. McCann never performed any assessment work upon the claim. From June, 1879, to the time of the patent, other owners performed this work. Dyer died in 1892. McCann died before that time. Dickson is dead or cannot be found. Two of the interested parties in the transaction, who knew the facts, are now deceased. The other is dead, or at least cannot be accounted for. The situation of the parties has materially changed since Dickson purchased. Primary evidence of the transaction is no longer obtainable. The deed is lost or destroyed. Under such circumstances, and after such unexplained and inexcusable delay in bringing suit, the defendants are not called upon to furnish that high degree of proof to establish the execution and delivery of the deed that might under other circumstances be required.

It also appears that in 1880 there was litigation over the property in which title had been held by McCann, by which Dyer claimed a lien for assessment work. The proceedings were public. J. L. Rawlins was referee in the case. It was a matter of public notoriety that Dickson then claimed an interest in the mine, and it was found that he did own it, and that Dyer had a lien upon it for which it was sold. Nearly six years passed before McCann's death, and yet no claim was ever set up by him to the property, although he knew that Dyer was at work upon it. Under ordinary circumstances, this unexplained delay and laches on the part of McCann, if not that of his administrator, would be considered a sufficient reason for refusing the relief prayed for in this case. It is said in *Mackall* v. *Casilear,* 137 U. S. 566, that: "The doctrine of laches is based upon grounds of public policy, which require, for the peace of society the discouragement of stale demands. And where the difficulty of doing entire justice, by reason of the death of the principle witness or witnesses, or from the original transactions having become obscured by time, is attributable to gross negligence or deliberate delay, a

court of equity will not aid a party whose application is thus destitute of conscience, good faith, and reasonable diligence. *Jenkins* v. *Pye,* 12 Pet. 241; *McKnight* v. *Taylor,* 1 How. 161, 168; *Godden* v. *Kimmell,* 99 U. S. 201; *Landsdale* v. *Smith,* 106 U. S. 391, 1 Sup. Ct. 350, 27 L. Ed. 219; *Le Gendre* v. *Byrnes,* 44 N. J. Eq. 372, 14 Atl. 621; *Wilkinson* v. *Sherman,* 45 N. J. Eq. 413, 18 Atl. 228." This doctrine is also sustained by the following authorities: *Board of Com'rs* v. *Chicago, R. I. & P. Ry. Co.,* (C. C.) 18 Fed. 209; *Hagerman* v. *Bates,* (Colo. App.) 38 Pac. 1100; *Sullivan* v. *Railroad Co.,* 94 U. S. 806; *Wood* v. *Fox,* 8 Utah, 397, 32 Pac. 48.

The declaration of McCann, deceased, that he had deeded the property to Dickson, and had received pay for the same, was a declaration against his own interest, and was made at a time when he knew that Dyer and Dickson were in possession of the claim, and knew that they had been in possession for years, doing work upon it. It was an admission of the person who made the deed. Had the declaration been made by a third party, to the effect that he had seen the deed, some evidence might be required showing the instrument to be genuine, and also showing its contents; but when a party admits such a fact against his own interest, testimony may be received of the admission against himself. This evidence is received on the ground of the extreme improbability of its falsity, and is entitled to consideration. In 1 Greenl. Ev. § 148, it is said: "The regard which men usually pay to their own interest is deemed a sufficient security both that the declarations were not made under any mistake of fact or want of information on the part of the declarant, if he had the requisite means of knowledge, and that the matter declared is true. The apprehension of fraud in the statement is rendered still more improbable from the circumstance that it is not receivable in evidence until after the death of the declarant, and that it is always competent for the party against

whom such declarations are adduced to point out any sinister motive for making them. It is true that the ordinary and highest tests of the fidelity, accuracy, and completeness of judicial evidence are here wanting, but their place is in some measure supplied by the circumstances of the declarant; and the inconveniences resulting from the exclusion of evidence having such guaranties for its accuracy in fact and for its freedom from fraud are deemed much greater, in general, than any which probably would be experienced from its admission." *Tilton* v. *Emery,* 17 N. H. 536; *Wynn* v. *Cory,* 48 Mo. 346; *Kerby* v. *Kerby,* 57 Md. 345; *Hodges* v. *Hodges,* 2 Cush. 455.

We are satisfied that there is testimony in the case sufficient to sustain the findings and decree. The judgment of the district court is affirmed with costs.

BASKIN and BARTCH, JJ., concur.

ST. LOUIS MINING & MILLING CO. OF MONTANA ET AL. v. MONTANA MINING CO., LIMITED.

(113 Federal 900. Circuit Court of Appeals, Ninth Circuit. March 10, 1902.)

[1]**No right to cross-cut through nostile claim to cut lode on dip.** The owner of a mining claim holding an apex within his lines and the right to work down from that apex has no right of way to drive a tunnel across the ground of another claim to reach his vein upon its dip.

The right of exploration is given for the discovery of mineral only.

Common law grant. Except as enlarged by the terms of the mining acts the rights of the holder of a mining claim are the same as the rights of the owner of land under the common law.

Appeal from the Circuit Court of the United States for the District of Montana.

TOOLE & BACH, for appellants.

W. E. CULLEN, E. C. DAY, and W. E. CULLEN, JR., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The St. Louis Mining & Milling Company is the owner of the St. Louis lode mining claim, and the Montana Mining Company, Limited, the appellee, is the owner of the Nine Hour lode mining claim, which adjoins the St. Louis claim on the east. The appellants were proceeding to drift a tunnel 260 feet underground horizontally from the St. Louis claim eastward, and into the Nine Hour claim, for the purpose of reaching and mining a lode

[1]**A tunnel has no right of way through prior patents.** *Calhoun Co. v. Ajax Co.* 21 M. R. 381.

which had its apex in the St. Louis claim, and which they had the right to pursue on its downward course, as it passed with its dip to the eastward out of their side line into the Nine Hour claim. It was stipulated that the tunnel, if projected in the course in which it was being drifted, would reach the vein or lode which had its apex within the St. Louis claim, and that in the course of its progress there would be encountered no other vein, lode, or ledge. At the suit of the owner of the Nine Hour claim, the circuit court enjoined the appellants from proceeding further with said tunnel. From that decree the present appeal is taken.

The case involves the interesting question whether the owner of a mining claim who has the right to pursue beyond the side lines of his claim a vein or lode which has its apex within his own claim is confined in his right to operations within or upon the vein itself, and is without authority to otherwise enter the adjoining claim. The appellants contend that a patent for a mining claim by its terms conveys only the surface of the claim, together with all veins, lodes, or ledges having their tops or apices within the surface boundaries thereof, and that the granting words of the appellee's patent circumscribe the right of the grantee thereof to the precise estate granted, and that since the mining law confers the general right to explore and purchase the mineral lands of the United States the appellants, in this instance, have the right to explore within the Nine Hour claim, and thereby reach their own property, so long as they interfere with no right granted to the owners of the latter claim. It is true that the statute (section 2322, Rev. St.), and the patents thereupon issued, confer upon the locators of mining claims in terms only "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or

ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations"; and that the statute further specifies that such locators, notwithstanding their extralateral rights, shall have no authority to enter upon the surface of a claim owned or possessed by another. But the appellants must find in the same statute the full measure of their own right. What are the rights that are given by the patent to the owners of the St. Louis claim? They are given the right of possession of the surface and of everything within their own claim, except the veins or lodes therein, which may have their apices in the surface of another claim, so as to give the owner of the latter extralateral rights, and they are given the right to follow outside of their side lines and into adjoining claims all veins or lodes which have their apices in their own claims, so as to confer extralateral rights. This is their right and no more. There is no warrant for saying that they have any general right of exploration within the land of an adjoining patented claim, whether upon or below the surface. The right of exploration is given for the purpose of making discovery of mineral. Of what avail would be the right of exploration if no benefit could be obtained from discovery made thereby? The ground covered by a subsisting, valid mineral location is open to exploration only by the owner thereof. The statute gives the appellants the right to follow the vein which they are seeking to reach by the tunnel, but it confers upon them no right to approach it from any point other than from the vein or lode itself. The mining laws, as we construe them, grant to a mineral locator more than the mere right to the surface of his claim and to the veins or lodes which have their apices therein. The statute (section 2319) declares "the lands" in which valuable mineral deposits are found to be open to occupation and purchase; and section 2325 provides that "a patent for any land claimed and located for valuable deposits may be obtained in the following manner."

These provisions tend to indicate that the patent when issued is a grant of land with all the rights incident to common-law ownership. The reason for specifying in the description of the grant the "veins, lodes, and ledges" is for the purpose of defining what is granted in addition to the land, namely, the right to pursue such veins, lodes, and ledges extralaterally in case they depart from the perpendicular and extend beyond the side lines of the claim. This view is in accord with the trend of all the decisions to which our attention has been directed. In *Copper Co.* v. *Heinze,* 64 Pac. 326, 53 L. R. A. 491, the supreme court of Montana held, in substance, that the owner of a mining claim is *prima facie* the owner of a vein or lode found at a depth of 1,300 feet within the vertical planes of the lines of his own claim, and that that presumption would prevail until it was shown that the vein had its outcrop in the surface of some other located claim in such a way as to give to the owners of the latter the right to pursue it on its downward course. The court said:

"Upon a valid location of a definite portion of land is founded the right of possession. The patent grants the fee, not to the surface and ledge only, but to the land containing the apex of the ledge. The right to follow the ledge upon its dip between the vertical planes of the parallel end lines extending in their own direction, when it departs beyond the vertical planes of the side lines, is an expansion of the rights which would be conferred by a common-law grant."

Of similar import is *State* v. *District Court,* (Mont.) 65 Pac. 1020.

In *Doe* v. *Waterloo M. Co.,* (C.C.) 54 Fed. 935, Judge Ross said: "Except as modified by the statute, no reason is perceived why one who acquires the ownership or possession of such lands should not hold them with and subject to the incidents of ownership and possession at common law."

In *Cons. Wyoming M. Co.* v. *Champion M. Co.,* (C. C.) 63 Fed. 540, Judge Hawley said:

"Hands off of any and everything within my surface lines, extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim."

We find no error in the decree of the circuit court. *The decree is affirmed.*

[1]EMPIRE STATE-IDAHO MINING & DEVELOPING CO. ET AL. v. BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO.

(114 Federal 420. Circuit Court of Appeals, Ninth Circuit. March 10, 1902.)

Patent determines priority wherever a surface conflict. Issuance of a patent, after due notice, for a mining claim, conclusively determines its priority, as to the surface and the incident extralateral rights, over claims whose surface lines conflict therewith.

In error to the Circuit Court of the United States for the District of Idaho.

W. B. HEYBURN, for plaintiff in error.

CURTIS H. LINDLEY and JOHN R. MCBRIDE, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. These were cross writs of error sued out by the defendant to the action of ejectment brought in the court below by the defendant in error as plaintiff, based upon its ownership of the Stemwinder mining claim. The case was tried without a jury, and resulted in certain findings of fact, annexed to which, as illustrative of them, was a diagram showing, among other things, the underground segment of the ledge for which the court below gave the plaintiff to the action judgment. The plaintiff brought the case here by writ

[1]Modifies S. C., 21 M. R. 317.

Survey may be amended to reform end lines. *Walrath* v. *Champion Co.* 63 Fed. 552. *Last Chance Co.* v. *Tyler Co.* 61 Fed. 557.

The rights of a tunnel are not concluded by a patent, it having no opportunity to adverse. *Uinta Co.* v. *Creede Co.* 22 M. R. 445; 196 U. S. 337. *Enterprise Co.* v. *Rico Aspen Co.* 18 M. R. 661.

of error, and we held that the underground segment for which the court below awarded the plaintiff judgment constituted a part of the Last Chance mining claim, of which the findings showed the defendant Last Chance Mining Company to be the owner, and, being awarded more than it was entitled to, the then plaintiff in error had no just cause of complaint. The judgment thus brought under review was accordingly affirmed. *Bunker Hill Co.* v. *Empire State Co.*, 48 C. C. A. 665, 109 Fed. 538. The then plaintff in error thereupon filed a petition for a rehearing of the cause solely upon the ground that this court erred in holding, as it did, that the owner of the Stemwinder claim was estopped from claiming anything embraced by the Last Chance patent, by reason of the failure on the part of the Stemwinder to contest the application of the Last Chance for its patent. The defendants to the action having meanwhile sued out the present cross writs of error, the respective parties requested the court to hear and consider the petition for rehearing along with the cross writs, which has been done. A careful re-examination of the questions considered in the opinion of the court above cited satisfies us of its correctness, although to avoid the misconception of that opinion taken by counsel for the then plaintiff and present defendant in error, and make it more clearly express its meaning, we here so alter the clause of the opinion, as reported at the top of page 547 of volume 109 of the Federal Reporter, and page 674, 48 C. C. A., as well as the original, as to make it read as follows:

The application for the patent for the Last Chance was, as has been seen, for the whole claim, as indicated in the diagram hereinbefore set out, and carried with it, as has been said, the implied, if not the expressed, allegation that the location was made upon land at the time open to location, and was therefore prior to any location thereof by any one else. The issuance by the government of its patent, after due notice to all the world of the application, and ample notice to every one

to contest it, conclusively determined, as against every one whose surface lines conflicted therewith, the priority of that location over every other, including the Stemwinder, and conferred upon the patentees and their successors in interest not only the entire surface of the claim, but, as against every one whose surface lines conflicted with those of the Last Chance, the extralateral rights conferred by section 2322 of the Revised Statutes to follow on their dip outside of the side lines, and within vertical planes drawn through the parallel end lines extended in their own direction, all veins, lodes, or ledges the tops or apexes of which lie inside the surface lines of the claim. As a matter of course, in the absence of a surface conflict, there would be no ground for an adverse claim, and no question would arise of which the land department could take cognizance. Conflicts in respect to extralateral rights growing out of locations whose surfaces do not conflict, and which are therefore beyond the purview of the proceedings in the land department, are matters solely for the determination of the courts when brought before them.

The necessary result of an adherence to that opinion is that on the present writs the judgment of the court below awarding to the plaintiff to the action the underground segment above indicated, and which the findings show constitute a part of the Last Chance claim, must be reversed. And as the findings fail to show that the defendant Empire State-Idaho Mining & Developing Company has infringed upon any right of the plaintiff, judgment must be directed in favor of both of the defendants. In the brief of counsel for the present defendant in error we are asked to now adjudicate between the extralateral rights of the Stemwinder claim and the Viola claim, shown in a suit just decided by this court to be the property of the defendant Empire Company. But the judgment roll upon which the present writs must be disposed of presents no such question. The bill of exceptions embodied in the record cannot be considered, for the reason that the

assignment of errors, save only the one challenging the sufficiency of the findings of fact to support the judgment, relate only to questions which cannot be considered by the appellate court. *Empire State Co.* v. *Bunker Hill Co.*, (just decided) 114 Fed. 417.

The judgment is reversed, and cause remanded, with directions to the court below to enter judgment for the defendant on the findings.

L. C. SHATTUCK ET AL. v. MARTIN COSTELLO.

(68 Pacific 529. Supreme Court of Arizona. March 18, 1902.)

Both titles to be determined in an adverse suit. Where the defendant in an action to quiet title by the locator of a mining claim alleges a conflicting location, and asks to have his title quieted, the court must pass on the validity of defendant's title as well as plaintiff's, though the latter need only be determined under a general denial.

Findings under Arizona practice. Under Rev. St. 1901, par. 1406, requiring the court on the trial of an issue of fact to make separate findings of fact and law, on which judgment shall be entered, a finding, in an action to quiet title to a mining claim in which defendant alleges a conflicting location and asks that it be quieted, that the court finds in defendant's favor on all the issues of fact, and that all the allegations of his cross complaint are true, is not sufficient to authorize judgment quieting defendant's title in described premises, but full findings of fact should be made.

[1]**Over prior location not abandoned.** Evidence in an action to quiet title to a mining claim in which the defendant sets up a prior location considered, and *held* to show that at the time of the defendant's location the claim was already covered by an existing valid location, and was not susceptible of relocation.

Burden on each party. Where plaintiff in a suit to quiet title to a mining claim claims under a location subsequent to a conflicting location by defendant, who also asks to have his title quieted, the burden is on each of the parties to prove the validity of their location, the plaintiff having the duty of taking the lead in such proof.

Tieing to other claims. Other mining claims may properly be used in a mining location to designate the boundaries of the claim, as it is a

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[1]A valid relocation cannot be made unless the prior owner's rights have been abandoned or otherwise determined. *Lockhart* v. *Rollins*, 16 M. R. 16. *Hall* v. *Arnott*, 80 Cal. 348; 22 Pac. 200. *Book* v. *Justice Co.* 17 M. R. 617.

An owner who has failed to do his annual labor may relocate. *Warnock* v. *DeWitt*, 11 Utah 324; 40 Pac. 205.

Failure to do annual labor makes ground open to relocation. *Morgan* v. *Tillotson*, 73 Cal. 520; 15 Pac. 88.

A locator may relocate by new name over a prior shorter location of his own and take in new ground. *Shoshone Co.* v. *Rutter*, 19 M. R. 356.

sufficient reference to natural objects and permanent monuments to comply with the statute.

Such ties presumptively valid monuments. A party contesting the validity of a mining location described by reference to other mining claims on the ground that the latter claims have no existence has the burden of showing such fact.

Admission by reference to prior location. On December 12, 1895, defendant located a mining claim. On January 1, 1896, plaintiff located the same claim. In the ensuing suit to quiet title the issue was whether a prior location was existing at the time of defendant's location, so as to invalidate defendant's claim. On January 27, 1900, defendant filed location notices with the declaration that they constituted "a relocation of the ground formerly located by unknown parties, and abandoned in 1895 or 1896." *Held*, that the filing of relocation notices was an admission by the defendant that his location of December 12, 1895, was premature.

Appeal from District Court, Cochise County; before Justice GEORGE R. DAVIS.

Suit to quiet title by L. C. Shattuck and another against Martin Costello. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

BARNES & MARTIN, for appellants.

JAMES REILLY and BEN MORGAN, for appellee.

Where in a suit the Court had decided that neither claimant to the mine had title; a location by one of the parties after such adjudication held valid. *Lauman* v. *Hoofer*, 37 Wash. 382; 79 Pac. 953.

New rights cannot be acquired by relocation inconsistent with the intervening rights of others. *Bunker Hill Co.* v. *Empire State Co.* 134 Fed. 268.

The Nevada Act (Cutting §§ 210, 213) does not require an additional certificate within 90 days when the original certificate required no correction for errors. *Porter* v. *Tonopah Co.* 133 Fed. 756.

A relocator is not a discoverer; he is an appropriator. *Zerres* v. *Vanina.* 134 Fed. 610.

A pretended relocation by marking the stakes of a prior claim followed by record, the relocator failing to show abandonment of the prior location, is void. *Moffat* v. *Blue River Co.* 33 Colo. 142; 80 Pac. 139.

STREET, C. J. Appellee Martin Costello, filed his application in the land office for a patent to the Leo mining claim, and within 60 days Francis A. Ovens and L. C. Shattuck filed an adverse, and brought their action in the district court of Cochise county. They set up their title to the Triangle mining claim, and allege that 7.91 acres of the Leo claim overlap the Triangle claim. The Triangle claim being a prior location, they ask that their title to the ground in conflict be quieted, and be declared to be in them, the plaintiffs. The defendant, Costello, answered, denying the validity of the Triangle claim, and, as a cross complaint, set up the location of the Leo mining claim, praying that he be entitled to the possession of all the Leo mining claim as described in his location notice, and that he be entitled to a patent from the United States, and that his claim be quieted as against the claim of plaintiffs' asserted right to the Triangle claim. The cause was tried to the court, and defendant, Costello, had judgment against L. C. Shattuck upon the following findings of fact: "The court finds from the evidence that the plaintiff Francis A. Ovens died some time during the year 1898, before the commencement of this suit, and before the adverse claim made in plaintiff's complaint was filed in the United States land office at Tucson. As between the plaintiff L. C. Shattuck and the defendant, Martin Costello, upon the issues of fact the court finds in favor of the defendant and against said plaintiff, and that the allegations of defendant's cross complaint are true." Numerous assignments of error were made, all of which, in effect, were that the findings of fact and the judgment were contrary to the evidence, and also that the findings of fact were too general to base a judgment upon.

The statute provides that: "In all cases where a trial of an issue of fact is held by the courts of record of the territory, the decision of the court shall be in writing, and filed with the clerk within thirty days after the trial takes place. In giving

the decision the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly." Rev. St. 1901, par. 1406. As the issues were made up, it was within the power of the court to find for the appellants, supporting the Triangle claim, or for the appellee, supporting the Leo claim, or for the government, not supporting either of said claims. Had the trial been upon issue raised by general denial, the court would not have been compelled to pass upon the claim of appellee, and the issue would have been only as to the validity of the Triangle claim, and the right of the owners thereof to maintain the same against the government; but, the appellee having set up the Leo claim, and asked for an adjudication of his right to that claim and to a patent therefor, it became the duty of the court to determine the validity of that claim as well as the Triangle claim. Where a defendant merely denies the allegations of plaintiff's complaint, a general finding for the defendant will be sufficient; but where the defendant sets up a cross complaint, and asks for affirmative relief, based upon the facts set up in the cross complaint, a general finding for the defendant is not sufficient, but there should be a special finding of fact upon the cross complaint upon which a judgment can be founded. The judgment adjudged "that the defendant, Costello, is the owner of and entitled to the possession of the Leo mining claim, as described in his recorded notice of location thereof, dated December 12, 1895, and in his cross complaint in this suit, as follows, to wit." Then follows the description, etc. "And it is further ordered, adjudged and decreed that the title and right of possession of said defendant, Martin Costello, to the said Leo mining claim is forever quieted and confirmed as against the plaintiff L. C. Shattuck," etc. The judgment goes far beyond the findings so prepared. Under the statute, and under defendant's cross complaint, if the court found in favor of the cross complaint, full findings of fact should have been prepared and signed,

upon which a judgment could have been based. But appellant's assignments of error go further, and say that the findings of fact are unsupported by the evidence, or against the weight of evidence; which leads us into an investigation of the evidence, for, if we should find that the evidence did not present a substantial conflict, but was clearly of such import as to properly support findings in favor of the plaintiffs instead of the defendant, it would be the duty of this court to reverse the judgment.

The Triangle location, claimed by appellants, was located on the 1st day of January, 1896; the Leo mining location, claimed by appellee, was located on the 12th day of December, 1895. It is conceded that there is a conflict between the locations to the extent of the 7.91 acres of ground in dispute, but the chief contention between the parties is whether the ground located by appellee on the 12th of December, 1895, was at that time open to location; for, if the ground was open to location at that time, it is plain that the Leo was the prior location to the Triangle. The dispute centers around a mining claim called the "Henrietta," alleged by the appellants to have been located by S. D. Moore, April 2, 1893, and the ground covered thereby was not open to relocation until the 1st day of January, 1896, when appellants located it. Both the appellants and the appellee, in proving the validity of their respective mining locations, would have to show that the ground was mineral land open to location, and, if any prior location covered the same ground at the time of either of the locations, such subsequent locations would be void; so the burden of proving the validity of the Triangle location and the validity of the Leo location was cast upon each respectively. It is admitted that the ground covered by each location is mineral ground, but there are no admissions as to the validity of the Henrietta mining claim.

It became the duty of the appellants to take the lead in such proof. The description in the location notice of the

Henrietta mining claim describes it as located one mile south of the town of Bisbee, and bounded on the north by the Uncle Sam mining claim, on the west by the Iron Prince mining claim, on the south by the Jeff Davis mining claim, on the east by the Tip Top and Woodchopper mining claims. To name mining claims as the boundaries of a location is such a reference to natural objects and permanent monuments as to comply with the statute. The presumption is that such objects exist, and the duty to show that they do not exist is cast upon the disputing party. It is in evidence, however, that the Woodchopper mining claim is a patented mining claim belonging to the Copper Queen Company. Shattuck, in his testimony, says he was acquainted with the ground in dispute; that he had been on it several times; that he knew that Dr. Moore had a claim there, and he knew he had not done his assessment work in 1895, but had done it in 1894; that Dr. Moore had shown him all the monuments, and that he knew them very well; that Moore had taken him all around the claim, and had wanted him to buy in it, and had shown him his lines and monuments; that Moore abandoned the claim in 1895; that he tried to get Shattuck to take all the claims and do the assessment work for a half interest, saying that he was going to allow them to run out in 1895; that Moore did not do any assessment work in 1895, and told witness he was going to abandon it; that the name of the claim was the Henrietta. Witness testified that the Triangle claim is inside the boundaries of the Henrietta claim; that the Henrietta was too big a claim to come out right; that all the Triangle claim was inside the boundaries of the Henrietta; that he knew the Uncle Sam, the Iron Prince, the Jeff Davis, the Tip Top, and the Woodchopper mining claims, and described how the Henrietta was located in reference to them, as Moore showed him the monuments of the Henrietta. Witness also described the location of the Henrietta monuments in reference to the Triangle monuments.

He also said he knew the claim on the ground called the "Leo," and knew the monuments there; that he had seen them; that he was with the surveyor when he surveyed for a patent for the Leo; that he knew the discovery shaft of the Leo on the ground, and that the discovery monument was within the boundaries of the Triangle claim; that he saw the location notice in the monument. Witness also drew on the blackboard a diagram of the Henrietta, the Triangle, the Iron Prince, the Uncle Sam, and the Woodchopper claims, which showed the Triangle and the Henrietta claims to be substantially the same, the Triangle lines coming within the boundaries of the Henrietta. Witness testified that the Henrietta claim joins the end of the Woodchopper claim, but did not quite strike the side lines of the Uncle Sam claim; that Moore had taken him upon the ground two or three different times, wanting him to buy in with him, and at such times showed witness the monuments. Witness testified that he saw the work being done on the Henrietta in 1894; that when Ovens located the Triangle claim he knew that the Henrietta had been a location, and that Ovens was locating nearly the same ground, and that it was located for the reason that the assessment work had not been done for 1895; that he knew Ovens was a citizen of the United States, and witness had known him for many years; had known Ovens voted at the elections in Arizona; that witness knew Moore was a citizen of the United States; that Moore had told him he was born in Illinois; that he knew him to be an army doctor and an army surgeon; that Moore was in the territory 12 years, at Bisbee, and practiced medicine there.

John Pirrung, a witness, testified that he knew the ground covered by the Iron Prince, the Standard, the Roy, the Triangle, and the Woodchopper claims, and the boundaries of the Triangle claim; that he first knew the Triangle claim in January, 1896; that the ground covered by the old Henrietta claim was located about three or four years prior to the Tri-

angle claim; that Moore claimed to be the owner of the Henrietta; that witness saw a notice of the Roy location inside of the Triangle ground, signed by Martin Costello as the locator and Pat Cunningham as witness, dated December, 1895. George Hill, a witness, testified that he knew the ground included within the location of the Triangle; that he was up there in January and February, 1896; that he went up there to show Dolan a monument on the Standard; that witness saw location notice of the Roy, signed by Costello and Cunningham, inside of the lines of the Triangle.

J. A. Rockefeller, a witness, testified that he was a surveyor, and had surveyed the claims known as the "Leo" and the "Roy," and attempted to rerun the old lines of the Henrietta. Witness produced a map, and pointed out monuments of the Leo and the Roy. He testified that he found the center end of the Leo marked in a corner of the Woodchopper claim; that there was a monument of the Tip Top, and it was also marked the Leo and the Roy; that he found a corner of the Leo marked on the center end of the Woodchopper, and in making the official survey the end lines would not be parallel, and he drew the corner in some 90 or 91 feet from this point on the line between this corner and this center end of the Woodchopper, which was scribed for the corner of the Leo. In describing further the monuments, witness said, pointing on the map, "I found a location corner probably fifteen feet out from the corner that I established—that is, corner number three—just as in the other case, in order to make the claims parallel, and make the claims symmetrical." Witness gave full descriptions of lines which he ran, all tending to show that the Leo and the Triangle covered the same ground as had been covered by the Henrietta. Defendant, in offering evidence in support of his claim, and in opposition of the offer made by plaintiffs to support their claim, nowhere produced such evidence as would show that the Henrietta had never been a mining claim or a valid loca-

tion, nor did he show that the assessment work had not been done in 1894.

The result of the evidence produced by the respective parties leads to the conclusion that the Henrietta mining claim was an existing, valid location up until the close of the year 1895; that when Costello made the location of the Leo, December 12, 1895, the ground was not open to relocation and he could not initiate any rights at that time. No one could initiate a right by an attempted location before January 1, 1896, which was the date of plaintiffs' location. The evidence in regard to these conflicts is not as clear and as distinct as one could desire, but if the Henrietta is to be regarded as a valid, existing claim (and upon that point we have no doubt), then the evidence more strongly shows that it was a valid, existing claim on the 12th of December, 1895, and included ground which is the subject of this conflict, than that it was abandoned or forfeited before 1895. The evidence of witnesses in those particulars, taken in connection with evidence that location notices bearing Costello's name had been recorded for the Leo ground, dated on the 27th day of January, 1900, with the declaration, "This is a relocation of the ground formerly located by unknown parties, and abandoned in 1895 or 1896; name of former location unknown," leads to the conclusion that the location of January 27, 1900, was the act of the former locator of the Leo for the purpose of strengthening his right to his earlier location. It stands in the nature of an admission by Costello that the location of December 12, 1895, was premature.

The judgment of the district court is reversed and case is remanded to district court for new trial.

SLOAN and DOAN, JJ., concur.

PARISH FORK OIL CO. v. BRIDGEWATER GAS CO.

(51 West Virginia 583; 42 S. E. 655. Supreme Court of Appeals. March 29, 1902.)

[1]**Lessor's right to treat lease as abandoned though one well sunk.** An agreement whereby certain lands, in consideration of $50, are granted, demised, leased, and let for the sole and only purpose of boring, mining, and operating for oil and gas, and laying pipes and building tanks, stations, and houses thereon to take care of the products, for the period of 15 years, and providing that the lessee shall complete one well on the premises within one year from its date, or pay the lessor a rental of 50 cents an acre for each year the lease may remain in full force after the first year, immediately after which provision the following stipulations are written: "But it is agreed and understood that the fifty dollars, paid in cash, is to pay all rentals on this lease for the period of one year from the date hereof. It is further agreed that when the first well is completed on said premises, then all cash rentals shall cease,"—does not bind the lessee to do anything further after completing one well on the premises, and upon his adandonment of further operations upon the premises for more than 18 months, leaving the well unprotected, so that it caved in and partially filled up, the lessor after waiting a year or more from the date of abandonment, had the right to lease the land to another.

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[1]Lease will not be construed to allow the lessee to pay rental as penalty and to hold the lease without work for speculative purposes. *Huggins* v. *Daley*, 20 M. R. 377.

Where lessees are to sink at a place to be agreed on it is enough for lessor to be ready and to wait for lessee to inform him that they are ready to locate. *Kokomo N. G. Co.* v. *Albright*, 18 Ind. App. 151; 47 N. E. 682.

Instance of lease providing for forfeiture but also for restoration of possession on a certain event—lessee restored. *Trotter* v. *Heckscher*, 42 N. J. Eq. 254; 7 Atl. 650.

Construction of lease as to becoming void, for failure to find oil within a certain time. *Miller* v. *Balfour* (Pa.) 22 Atl. 86.

An oil lease required lessees to drill well in six months or pay specified rental per annum for delay. After the six months were up the lessor relet to other persons: *Held*, that he could not collect rent from the lessee. Rent cannot be collected after forfeiture. *Wolf* v. *Guffey*, 161 Pa. 276; 28 Atl. 1117.

Lessee to begin work within a certain time and pay a certain rent

[2]**No title to the oil in the lessee.** The principal purpose and design of the parties to such a lease, clearly discernible from its terms, being the production and marketing of the oil and gas in the land for their mutual benefit, mere discovery of oil by exploration under it vests no title to it in the lessee, but it does vest in him the right to produce and take the same in accordance with the terms and conditions of the contract. In such right the lessee will be protected, but he must proceed to exercise it with reasonable promptness and diligence.

Development favored. When its terms will permit it under the rules of law, an oil lease will be so construed as to promote development and prevent delay and unproductiveness.

Distinction between quitting work and surrender of lease. The law recognizes a distinction between the abandonment of operations under an oil lease and an intention to abandon or surrender the lease itself. Unless bound by the terms of the lease so to do, it will not permit the lessee to hold the lease without operating under it, and thereby prevent the lessor from operating on the land or leasing it to others.

(Syllabus by the Court.)

Appeal from Circuit Court, Wirt County; L. N. TAVENNER, Judge.

Action by the Parish Fork Oil Company against the Bridgewater Gas Company. From a judgment for defendant, plaintiff appeals. Affirmed.

—rent construed not to begin till work begun. *Richardson* v. *Downs*, 13 Ky. L. R. 87; 16 S. W. 84.

Where there is a covenant to pay rent and no provision for forfeiture, failure to pay does not prevent the tenant recovering in ejectment. *Marshall* v. *Forest Co.* 21 M. R. 179.

Drilling a dry well and failing to pay the stipulated rental for further time vacates the lease. *Ohio Oil Co.* v. *Detamore*, — Ind. —; 73 N. E. 906.

Chancery has jurisdiction to cancel a deed conveying petroleum oil for failure to perform its covenants when the deed has a clause annuling it for such failure. *Carney* v. *Barnes*, 56 W. Va. 581; 49 S. E. 423.

[2]*Steelsmith* v. *Gartlan*, 19 M. R. 315.

S. D. TURNER, D. C. CASTO, and CAMPBELL, HOLT & DUNCAN, for appellant.

T. A. BROWN and W. N. MILLER, for appellee.

POFFENBARGER, J. This is an appeal from a decree of the circuit court of Wirt county, made in two causes, which had been consolidated. The Parish Fork Oil Company, a copartnership, claiming under a lease of 118½ acres of land, executed by Jacob S. Swisher to E. R. Woodyard, and dated June 4, 1894, had entered upon the land in August, 1898, and drilled a well about 200 feet deep, which was completed some time in September, 1898. The well was shot, and it was found to be a producer of oil in small quantities, the man who drilled it having taken out with the sand pump about one-third of a barrel; but no tubing was put in it, and it was not pumped. In the spring of 1899 the drilling machinery, belonging to one Abram Pearson, who drilled the well for the lessees under contract, moved all the machinery away, and the well was to all appearances abandoned. No further visible work was done upon the land by the lessees until early in June, 1900. The cash consideration mentioned in the lease was $50, and it was therein agreed and understood that said $50 was payment of the rental for one year; that is, from June 4, 1894, until June 4, 1895. The lease further provided that the lessees should "complete one well on said premises within one year, or the said E. R. Woodyard shall pay to said Jacob S. Swisher rental as hereinafter provided." A further provision as to rent was that the lessee should pay "fifty cents per acre for each year that this lease may remain in force after the first year." A further stipulation as to the payment of rent is as follows: "It is further agreed that when the first well is completed on said premises then all cash rentals shall cease." Another important clause of the lease reads as follows: "It is agreed

that this lease shall remain in force for the term of fifteen years from this date, and as much longer as the premises are operated for oil or gas." By its terms the lessor was to receive one-eighth of all the oil produced and saved from the premises and $50 per year for the gas from every gas well on the premises, the product of which might be marketed and used off the premises. The rentals were paid in advance each year until June 4, 1899, the last payment having been made June 2, 1898. Prior to the resumption of work by the lessees Swisher executed a subsequent lease sometime in 1899 to J. W. Bell and one Hewitt, but it was allowed to expire by reason of nonpayment of rental. Then Swisher executed another lease, covering the same land, to said Bell, who was an employee of the Bridgewater Gas Company, a Pennsylvania corporation, which lease was dated February 7, 1900, but was not recorded until some time in April, 1900. This lease was assigned to the Bridgewater Gas Company on the 1st day of August, 1900, and Bell says he took the lease for said company. Early in August, 1900, the claimants, under the two conflicting leases, undertook to begin operations on the land, each placing materials upon the ground and beginning the work of operation. This resulted in the institution of these two suits. On the 15th day of August, 1900, on a bill of the claimants under the Woodyard lease, praying a cancellation of the lease made to Bell as a cloud upon their title to the leased premises, and general relief, an injunction was awarded by Hon. G. W. Farr, judge of the Fifth judicial circuit, restraining the Bridgewater Gas Company, its agents and employes, from interfering with the premises. On the 21st day of August, 1900, upon the bill of the Bridgewater Gas Company, praying a cancellation of the Woodyard lease, and an injunction against the claimants thereunder, and general relief, an injunction was granted by Hon. Reese Blizzard, judge of the Sixth judicial circuit, restraining E. R. Woodyard, W. M. Cox, A. F. Dennison, and S. B. Sayre,

their agents, servants, employees, and assignees, from going upon the premises, and from doing any of the acts mentioned in the bill. An amended bill was afterwards filed by the Bridgewater Gas Company, and all the bills were answered, and affidavits and depositions were taken and filed by all the parties. Hon. Lewis N. Tavenner, the judge of said court, being a witness in the causes, Hon. Walter Pendleten was, by agreement, selected to try them, and on the 22d day of May, 1900, the causes were consolidated and heard together, and a decree was entered dissolving the injunction awarded to the claimants under the Woodyard lease, dismissing their bill, canceling the said lease of June 4, 1894, and perpetuating the injunction granted the Bridgewater Gas Company. From this decree an appeal has been taken by the parties interested in the Woodyard lease.

The question of paramount importance is whether the lessees who drilled the well under the lease of June 4, 1894, abandoned the lease, for that question must be taken into consideration in more than one aspect of the case. Its determination necessitates a fuller statement of the facts than has been given. At the time the well was drilled the Woodyard lease was owned by S. E. Mobley, E. Jones, W. M. Cox, and E. R. Woodyard. Mr. Woodyard had retained a one-fourth interest in the lease, and the balance of it had been assigned, directly or indirectly, to the other parties, each of whom held distinct fractional interests. D. C. Mobley, the husband of S. E. Mobley, had the management and control of the operations upon the land, as agent of the owners of the lease. After the well had been drilled, shot, and cleaned out, and a showing of oil found in it, Mobley located another well, and talked of going on and drilling more wells, with the intention of connecting and operating them together by power from one plant, but that was not done. The contractor—Pearson—testifies that he was to go right on and drill another well, when notified to do so, but that there was some delay

in paying him for the work he had done, and he received no notice to begin work on a new well, and his tools remained at the well during the fall and winter, and in the spring he moved them all away. It is admitted that at the time of the completion of the well there was a failure of water by reason of dry weather in that locality, but it is uncertain how long that condition existed. Shortly after the cessation of work on the lease, Mobley became interested in other business, and declined the further management of the work on the lease, and then his wife sold her interest. He and W. M. Cox testify that when he gave up the management Cox was to take charge of it. Cox took sick with pneumonia in the fall, and was unable to do anything during the greater part of the winter. In the year 1898 Cox was engaged in oil prospecting and development in Ohio, near Marietta, and he says that as soon as he became able he went over there to look after some business, and then came back to Parkersburg, and purchased machinery and supplies for the development of the Swisher land under the Woodyard lease; but before these tools and supplies were shipped he was notified by J. W. Houke that Swisher had no title to the land, and that the legal title was in him (Houke) and one T. H. Murphy, both of Parkersburg; and thereupon he abandoned the idea of resuming work on the lease until the title could be perfected, and went back to Ohio. He claims to have written from Marietta five letters to Swisher, urging him to perfect his title. These letters were dated May 10, June 17, August 12, September 17, and October 22, 1899, and addressed to Swisher at Elizabeth, W. Va.; but Swisher denies that he ever received any of them, and further says that at that time Elizabeth was not his post office. Cox says the letters were inclosed in return envelopes, and that none of them ever came back to him. The Swisher title was in this condition: It was perfect and undisputed as to 68½ acres of the land and the well had been drilled on that part

of it. The other 50 acres was in two tracts, one containing 21 acres and the other 29 acres. Houke and Murphy, in the year of 1881, had sold these two tracts to one Isaac Trader, executing to him a title bond. Swisher had purchased the interest of Trader, and assumed the payment to Houke and Murphy of three notes for the sum of $66.66 each, executed by Trader for purchase money. Swisher had paid off two of these notes and $70 on the principal and interest of the third one, as he contends. The only dispute as to these payments is in respect to $30, which Swisher handed to Lewis N. Tavenner on the 27th day of March, 1889, to be paid to Houke. Judge Tavenner has no recollection of handing the money to Houke, but he is satisfied that he either did that or that it was included in some of the checks which he filed. From this it is clear that nothing stood in the way of Swisher's obtaining a deed for the 50 acres of land except the payment of a very small amount of money. However, Houke says Swisher had given him, by verbal contract, in consideration of forbearance, an interest in the mineral in the land. It is also shown that Mr. Woodyard, the lessee, knew the condition of Swisher's title at the time the lease was executed. Cox's only effort to get Swisher to perfect the title was the writing of said letters. He never went to see Swisher about it, nor did Woodyard or any of his associates. In the winter of 1899 Cox was sick again for a considerable time, and it is claimed by the appellants here that all this long period of delay is excused and accounted for by these circumstances, failure of water, bad weather, Cox's sickness, and defect of title, and that they never had any intention of abandoning the lease. On the other hand, it is claimed that the appellants actually abandoned the lease, and are now setting up these matters as mere pretenses and subterfuges; and attention is directed to their long absence from the premises, the condition in which they left the well, and their permitting the machinery which was on the ground

to be taken away. How long there was a lack of sufficient water to carry on the work does not appear, but there was certainly water during the winter, and it is shown by the testimony in the case that such work could be and was carried on in that part of the country during the winter. If the well was protected in any way during the winter from the surface water and from the throwing of obstructions into it, it was only by a board laid over the top of it and held in place by a wrench or some tools. Pearson says the tools were left hanging in the well. Swisher and others say there was a board over it. When Pearson moved his machinery away, one Ash, who was assisting him, cut a wooden block and plugged the well with it, and this probably remained in it for about a year. Only two pieces of casing were put in, and these were not of sufficient length to go down far enough to prevent the well from caving nor to shut off from the well what is called "surface water"—water which comes into the well above the oil sand. No examination of the well seems to have been made until after these suits were brought. Swisher and Bell testify that in January, 1901, they took a line, tied a piece of cast iron to it weighing several pounds, and with that measured the depth of the well, and found that it was then only 104 or 105 feet deep, and the casting brought up with it clay or other substance, which was of the character of that which caves into an unprotected well in that locality. They also found that water stood in the well to within 12 or 13 feet of the top, and that there was but a scum of oil on it. It further appears from the testimony that the opening and cleaning out of a well in that condition is more expensive and difficult than the drilling of a new well. Other pertinent facts bearing on the intention of the lessees and the construction of the lease are that all who were concerned in the well drilled, including Swisher, thought there was oil there in paying quantities. Swisher seems to think the well was injured by shooting, but he gives no good

reason for that. Mobley was present when the well was shot, and he says they found lubricating oil at 74 feet, and it was his judgment that, had they stopped there, the well would have produced one barrel a day. He says that when they went down into the second Cow Run sand and shot the well it flowed up to within 45 feet of the top.

It is suggested in the briefs for the appellees that the lease in question here is very similar to the Gartlan lease construed in *Steelsmith* v. *Gartlan,* 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107, but in some respects they differ widely. In the Gartlan lease the consideration expressed was only $1, while here it is $50; but that is unimportant, for it is expressly agreed in the lease that the $50 is for the rent for one year. The Gartlan lease did not bind the lessee to do anything but drill one well on the premises. It contained no covenant to pay rent even for delay in putting down the well. By reason of its failure to impose any obligation on the lessee to do anything after drilling a dry hole and his abandonment of the premises, it was held that the lease created an estate at will, and the lessor had the right to lease the land to another. Here, as has been shown, there is a covenant to pay rent, and one of the pivotal questions in construing the lease is, when does that obligation cease? If it continues after an unsuccessful effort to find oil, or after it is found, but production is abandoned, it has never ended, unless on the theory of abandonment of the lease. The rent is not made payable in advance, nor is any time fixed for its payment, nor does the lease contain a clause of forfeiture. If the completion of a dry hole on the premises operates a cancellation of the obligation to pay rent under the clause, "it is further agreed that when the first well is completed on said premises, then all cash rentals shall cease," there would be an end of all obligations or covenants on the part of the lessee, for he is not bound to drill a second well by the terms of the lease. Such construction would class this lease

with the Gartlan lease, and abandonment of the premises after putting down an unproductive well would end the lease.

A widely different view of the legal meaning of the lease is the one taken by the lessees. It is not contended for in the argument, but, as it serves to throw light on the conduct of the parties, and affects the question of intention, so vital in determining whether there has been an abandonment of the lease, it is here given and discussed. Taking the meaning of the clause last quoted to be that the completion of a dry hole, or a well by which oil is discovered, but from which none is produced, operates an extinguishment of the obligation to pay rent, and vests in them title to the oil in the land, the lessees, after completing this well, refused to pay any more rent, and denied that any was, or would thereafter become, due. Both Cox and Woodyard insisted, after the well had been drilled, that they were not bound to pay any more rent. Soon after the 4th day of June, 1899, the date to which the rent had been paid, Swisher wrote Woodyard a letter in reference to the rent and the lease, and he says he notified him that the lease was forfeited. Woodyard admits having received a letter from Swisher, but says he does not remember its contents. He says that on another occasion, still later, he saw Woodyard, and told him that the lease was forfeited, and Woodyard insisted that under the lease he was to pay no rent after the completion of a well; and on the witness stand in this case he still insisted that he was not bound to pay any more rent, but that he was entitled to hold his lease without such payment. On the 24th day of August, 1900, Cox made Swisher a tender of the rent up to June 4, 1900, with the interest thereon, but he coupled it with a protest to the effect that no rent was due him. This position of the lessees is based upon the assumption that by drilling a well and finding oil they acquired a vested interest in the oil and gas in that tract of land. Until oil is discovered

in paying quantities, the lessee acquires no title under such lease. It simply gives a right of exploration. *Steelsmith* v. *Gartlan,* 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107; *Venture Oil Co.* v. *Fretts,* 152 Pa. 451, 25 Atl. 732; *Plumbers* v. *Iron Co.* 160 Pa. 483, 28 Atl. 853; *Crawford* v. *Ritchie,* 43 W. Va. 252, 27 S. E. 220. After the discovery of oil in paying quantities, it is held that title does vest in the lessee, but there is no case which goes so far as to announce that after mere discovery of oil the lessee, upon the assumption of a vested interest or title, may cease operation, refuse to develop the property, tie up the oil by his lease, and simply hold it for speculative purposes, or to await his own pleasure as to the time of development. A well-settled principle of law is that a contract shall be construed as a whole, and in the light of the purposes and objects for the accomplishment of which it was made. Oil leases are no exception to the rule, and, as the subject-matter of the lease is peculiar in its nature, the courts have given this principle great latitude in their construction. They are executed by the lessor in the hope and with an expressed or implied condition that the land shall be developed and oil produced. When production takes place, the lease is mutually beneficial. The royalty which it is stipulated in all these leases that the land-owner shall receive is generally the moving cause of the execution of the lease. If there is one principle that is asserted in *Steelsmith* v. *Gartlan* more vigorously and with more emphasis than any other it is that the lessee shall proceed to make the lease profitable to both parties, and that he shall not be permitted to tie up the land. "The 'testing' provided for was manifestly a condition upon which the lease depended. If such test showed no minerals, then the contract was at an end; if it, on the other hand, showed the presence of valuable mines, then the lessees were bound to operate them in good faith for the joint profit of themselves and the owners of the fee. Technical words are

unnecessary to raise a condition. If a fair and reasonable construction of the instrument shows that a lease shall depend upon the doing or not doing something essential to the purposes of the contract, the law implies the condition." *Petroleum Co.* v. *Coal, Coke & Mfg. Co.,* 89 Tenn. 381, 18 S. W. 65. "It would be unjust and unreasonable, and contravene the nature and spirit of the lease to allow the lessee to continue to hold his term a considerable length of time without making any effort at all to mine for gold or other metals. Such a construction of the rights of the parties would enable him to prevent the lessor from getting his tolls under the express covenant to pay the same, and deprive him of all opportunity to work the mine himself or permit others to do so. The law does not tolerate such practical absurdity, nor will it permit the possibility of such injustice." *Conrad* v. *Morehead,* 89 N. C. 31. "Forfeiture for nondevelopment or delay is essential to private and public interest in relation to the use and alienation of property. In general, equity abhors a forfeiture, but not where it works equity and protects a landowner from the laches of a lessee, whose lease is of no value till developed." *Munroe* v. *Armstrong,* 96 Pa. 307. "The landowner is entitled to his royalty as promptly as it can be had. The danger of drainage from his small holding is increased by delay, and the resulting damage, not being susceptible of pecuniary measurement, is therefore not compensable. No such lease should be so construed as to enable the lessee, who has paid no consideration, to hold it merely for speculative purposes, without doing what he stipulated to do, and what was clearly in the contemplation of the lessor when he entered into the agreement." *Huggins* v. *Daley,* 40 C. C. A. 19, 99 Fed. 613, 48 L. R. A. 320. "If a farm is leased for farming purposes, the lessee to deliver to the lessor a share of the crops in the nature of rent, it would be absurd to say, because there was no express engagement to farm, that the lessee was under no obligation

to cultivate the land. An engagement to farm in a proper manner and to a reasonable extent is necessarily implied. The clear purpose of the parties to this lease was to have the lands developed, and the half-yearly payments and the other sums stipulated were intended not only to spur the operator, but to compensate Ray for the operator's delay or default." *Ray* v. *Gas Co.* 138 Pa. 576, 20 Atl. 1065, 12 L. R. A. 290, 21 Am. St. Rep. 922. "If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of the contract." *Crawford* v. *Ritchey,* 43 W. Va. 252, 27 S. E. 220. All the provisions of the contract must be effective, if possible. By its terms this lease is to be in force for the period of 15 years from its date, and as much longer as the premises are operated for oil or gas. Another provision is that the lessor shall have one-eighth of the oil produced and $50 per annum for each gas well. It is just as important to the lessor that, when discovery of oil is made, the land shall yield him his royalty, as it is that discovery shall vest in the lessee title to the balance of the oil. If the lessee shall be permitted to sit down, and refuse to produce, after discovery, the lessor loses a part of what he contracted for. The contract bears no such construction as that. What the lessee acquires by discovery is the right to produce and take the oil, paying out of it the stipulated royalty, and not title to the oil as it remains in the land without production. Hence this provision that, when a well is completed on the premises, all cash rentals shall cease, must be taken to mean that such cash rental shall cease only when a producing well is completed and operated on the premises, or that the completion of a nonproducing well extinguishes the obligation to pay rent, and places the lease within the principle announced in *Steelsmith* v. *Gartlan.*

Which is the true construction? If the former be taken, it must be said that after the completion of this well the

lessor had his right of action on the covenant to pay rent, and, as the lease contains no clause of forfeiture, all he could get during the whole period of 15 years would be his rent of 50 cents an acre—$59.25 per year—if the lessees should determine not to further prosecute their right of exploration. That would as effectually tie up the oil, and prevent production by the landowner or anybody else for a long time, as the construction which the lessees put upon the lease; but in so construing it the strict letter of the contract would be adhered to. The lessor agreed to take either the production of oil, yielding him one-eighth, or a rental of 50 cents an acre for each year that the lease may remain in force after the first year. There is no provision in the lease which compels the lessee to drill a well at any particular time, and, if this provision stood alone, unqualified by any other clause of the lease, the drilling of a well might be deferred during the whole period of 15 years, so that the lessor would receive nothing but the rent. It is useless to enter upon a discussion of the proper construction of this in view of all the other provisions of the lease had no well ever been drilled; for one has been drilled under the lease, and that makes it necessary to consider it along with the clause providing for extinguishment of the rentals. If the clause providing for the payment of rent shall be construed according to its very letter, is there any reason why the clause providing for the extinguishment of rent shall not be construed in the same way? If it be so construed, does it not mean that the completion of any well producing or nonproducing, shall put an end to the covenant to pay rent? If the parties meant that the completion of a well to so operate should be a producing well, why did they not say so in the lease? It was a matter of great importance to each of them. Why should the court read into the lease what the parties did not put in? If it means that the completion of any well should have that effect, they contemplated a virtual cancellation of

their respective rights under the lease with the completion of one well. One rule of construction is that every clause in a lease or contract shall have some effect, and it is presumed that it was inserted by the parties for some purpose. If a producing well was in the contemplation of the parties when they inserted this clause, they did a vain and useless thing in putting it in the lease. No court would so construe this lease as to compel the lessee producing oil under it to give the lessor his royalty and rental, too. The rental provision in the lease is never intended to continue after the production of oil begins. The completion of a producing well would end the obligation to pay rent, and this clause, providing for its extinguishment, would be useless in that event. In order to find any reason or purpose on the part of these parties for inserting it, it must be held to apply to a nonproducing well as well as a productive well, and thus end the obligation to pay rent in either event. But a careful inspection of all of that portion of the lease which relates to the payment of rent will show conclusively that this is the true interpretation of its meaning. It is as follows: "Second party covenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portions of the farm; to bury gas lines two feet below the surface, when notified so to do; and pay all damages to growing crops by reason of said operations; and, further, to complete one well on said premises within one year, or the said E. R. Woodyard shall pay to said Jacob S. Swisher rental as hereinbefore provided. The consideration upon which this lease is executed is as follows: Fifty dollars cash in hand paid, the receipt of which is hereby acknowledged, and fifty cents per acre for each year that this lease may remain in force after the first year; but it is agreed and understood that the fifty dollars paid in cash is to pay all rentals on this lease for the period of one year from the date hereof. It is further agreed that when the first well is completed on said premises then all cash

rentals shall cease." Clearly, it only means to make certain the cessation of any obligation to pay rent after the completion of one well. If the word "and" be inserted between the words "hereof" and "it," it supplies what has clearly been omitted by mere inadvertence, the link which connects this clause directly with the covenant to pay rent, and makes it qualify that clause. The covenant to pay rent itself is conditional by its very terms. The lessee agrees "to complete one well on said premises within one year, or" pay rent as thereafter provided. The provision referred to is that he shall pay 50 cents per acre for each year that the lease should remain in force after the first year. This being qualified by the clause providing for the cessation of cash rentals, it simply means that the rent shall be paid for each year that the lease may remain in force after the first year, but no longer than the completion of the first well on the premises. This makes it harmonize with the undertaking to complete one well on the premises within one year, or, in lieu of completing a well within the year, pay rent. This construction not only harmonizes with the true meaning and purport of the entire provision concerning rent, and adheres to the very letter of the clause itself, but also embodies and enforces that principle of law so universally announced by the courts, as shown by the authorities hereinbefore cited and quoted, which discourages tying up and rendering unproductive the vast fields of mineral wealth, construes every contract and lease as to both lessor and lessee so as to best promote production, development, and progress, and frowns upon every attempt to evade it as being in contravention of both good morals and public policy.

Under this construction it may be said that, had the lessees found this well, upon its completion, to be a dry hole, they could not have gone on and drilled another, and continued their exploration for oil, without making a new lease or contract. That is a question which neither this court nor any

other has ever been called upon to decide. How far the equitable principles which the courts apply in all cases involving rights under oil leases might be applied for the relief of one who is prosecuting his search in good faith and with diligence and at great expense, remains to be seen when such a case shall present itself. Such was not the case of *Steelsmith* v. *Gartlan,* nor is it true of this case. It is by no means conclusive of the question of abandonment that the lessees insisted that their lease was not forfeited, that there were some circumstances which rendered it inconvenient for them to continue the work of exploration, and that Cox made some effort to have the alleged defective title of Swisher perfected. All this is consistent with the intention to continue the work of exploration, but it is equally consistent with the intention merely to endeavor to hold onto the lease without doing any work under it—a thing which the policy of the law does not permit unless the right to do so is absolutely fixed and secured by the terms of the contract; and even then it is not always permitted.

In *Huggins* v. *Daley,* 40 C. C. A. 12, 99 Fed. 606, 48 L. R. A. 320, an illiterate farmer leased his land for the term of five years, and the lease contained this clause: "Provided, however, that a well shall be commenced upon the above-described premises within thirty, and completed within ninety days from the date hereof; and, in case of failure to commence and complete said well, as aforesaid, the lessee shall pay to the lessor a forfeiture of fifty dollars." Of this lease the court said: "The proof is clear that he never intended to drill the well within the time stipulated. This proviso was written by the lessee evidently for purposes of deception. He knew that the object of the lessor was to secure diligent search for oil, and he was 'keeping the word of the promise to the ear and breaking it to the hope;' skillfully turning it into a mere speculative lease binding the lessor and leaving himself free. It would be unconscionable

to hold the lessor bound." These excuses and pretenses of the lessees must be taken in connection with the other facts disclosed by the evidence in determining whether they had laid aside their purpose to go on in good faith and diligence to develop that land, and were simply making such pretense of preparation so to do as would enable them to say that they still entertained such purpose, or were actually using diligence, and doing what it was reasonably and fairly in their power to do to render the lease productive. Having drilled a well, which, according to their own representation, would have produced oil in paying quantities, if protected, they allowed it to fill up, and become absolutely worthless, according to the uncontradicted testimony in this case. This undoubtedly shows an abandonment of the purpose expressed by Mobley to drill other wells to be connected with this one, and all operated by the same power. It is further shown by the fact that Pearson, whom he intended to employ to do the work, was never requested to begin it, but was allowed to move his machinery away, leaving nothing except a mere hole in the ground to indicate that anything had been done upon the premises. While a lack of water may have delayed the work of cleaning out the well, putting in the tubing, and pumping it, no attempt is made to employ to do the work, was never requested to begin it, and otherwise protect the well from caving in and becoming filled up with obstructions. After leaving the premises in the fall of 1898, Mobley never returned. Cox never came upon the land, nor sent anybody else to it, until in April, 1900—very nearly the date on which the lease executed to Bell was recorded. At that time development and exploration for oil, which had not been active in that community for some time, were resumed, and there was considerable excitement. These circumstances, no doubt, had much to do with the effort on the part of Cox to resume work on the lease. But that effort came long after the time when they

should have been at work on the land, or doing something to evidence a purpose to develop it, and long after the occurrences which conclusively show an intent on their part to abandon the lease. The theory that the lessees, for a long time after the completion of the well, had no intention to go on with the work, but were simply trying to hold the lease without doing anything under it, finds strong support in the meaning which they put upon the lease. Under their misconception of it they claimed the right to hold it, and take their own time in which to develop the land. Prompt and vigorous work on a new well after abandoning the one put down, being in possession of the premises under a lease, which, by its own terms, had no binding force upon either party after the completion of one well, might have entitled them to stand upon the equity of the case; but certainly they are not entitled to do so after having delayed action for more than 18 months, under circumstances which strongly indicate an intention to indefinitely abandon further work on the premises.

These views result in the affirmance of the decree.

Affirmed.

COPPER KING, LIMITED, v. WABASH MINING CO. ET AL.

(114 Federal 991. Circuit Court, Southern District, California, N. D. April 10, 1902.)

[1]**Destruction of water right by shaft.** Where a mining company has acquired the exclusive right to the use of the water of a certain creek in working its mines, another company has not the right, in developing its mine by means of a shaft near the creek, to cut off and divert the waters flowing into it.

Notice binds to avoid consequences. Where a mine owner, at the time of commencing a shaft which cut off the waters flowing into a creek which another mine owner had acquired the exclusive right to use, was cautioned by the latter against cutting off such water, he is bound with notice of the consequences of his acts.

[2]**Comparative injury considered.** Where, in an action to restrain defendants from diverting water from a creek which plaintiff has acquired the exclusive right to use, the rights of the parties are in dispute, and a temporary injunction will work less hardship than its refusal, it should be granted.

In Equity. On application for temporary injunction.

MYRICK & DEERING, F. P. DEERING, M. K. HARRIS, and WILLIAM A. HARRIS, for complainant.

[1]Harmful though undesigned diversion of water by tunnel is *damnum absque injuria*. *Herriman Co.* v. *Butterfield Co.* 19 Utah 453; 57 Pac. 537.

Injunction refused against tunnel on the assertion that it would cut off an underground stream which had been intercepted in plaintiff's tunnel. *Williams* v. *Ladew*, 161 Pa. 283; 29 Atl. 54.

[2]Stream pollution by an iron company will not be enjoined, the injury to the public from the grant of the writ being considered as well as the loss to complainant sustaining it. *Clifton Iron Co.* v. *Dye*, 87 Ala. 468; 6 So. 192.

Injunction is no remedy for careless use of ditch. *Garrett* v. *Bishop*, 27 Oreg. 349; 41 Pac. 10.

Injunction refused where equities denied, proof uncertain and more harm to defendant than good to plaintiff likely to result. *Crescent Co.* v. *Silver King Co.* 14 Utah 57; 45 Pac. 1093.

F. H. SHORT and W. E. DUNN, for defendants.

WELLBORN, District Judge. The bill alleges, in substance, among other things, that complainant is the owner of the Copper King mine, situated on a natural water course known as "Dog Creek," in the county of Fresno, state of California, and for a number of years has been and now is engaged in the business of developing and working said mine and extracting ores therefrom, and for more than five years has diverted and appropriated for said business and domestic purposes all of the water of said creek, and by virtue of said appropriation has acquired an exclusive right to the use of said water, and that the whole of it is necessary for the business and purposes aforesaid, and, if complainant should be deprived thereof, its said business would be ruined and destroyed; that one of the defendants, the Wabash Mining Company, about June 20, 1901, commenced to sink a vertical shaft in the ground, about 50 feet from the channel of said creek, and that said shaft is 5 feet wide, 7 feet long, and 60 feet deep, and that by means thereof defendants have diverted and are diverting the water of said creek, and, unless restrained by this court, will continue to divert the same, and thereby cause the complainant great and irreparable injury.

In cases of destructive trespass by mining the solvency of defendant is not material. *Boyd* v. *Desrozier*, 20 Mont. 444; 52 Pac. 53. *Mabel Co.* v. *Pearson Co.* 121 Ala. 567; 25 So. 754.

Injunction denied against driving tunnel under ditch: it being asked for on the theory that it would undermine and drain the water from the ditch. *Lorenz* v. *Waldron*, 96 Cal. 243; 31 Pac. 54.

The Court will not enjoin where the defendant will suffer greater injury by the writ than the plaintiff by the wrong. *Lloyd* v. *Catlin Co.* 210 Ill. 460; 71 N. E. 335.

Should go against an insolvent licensee holding over after revocation. *Clark* v. *Wall*, 32 Mont. 219; 79 Pac. 1052.

Consideration of the instances where timber cutting is enjoinable and where it is a mere trespass remediable by law. *Gray L. Co.* v. *Gaskin*, 122 Ga. 342; 50 S. E. 164.

The prayer of the bill is that defendants be enjoined from maintaining said shaft, or otherwise diverting said water, etc. Defendants have filed an answer, denying all of said allegations, except as to the sinking of a shaft, and concerning that matter they admit that said Wabash Mining Co., at the time alleged in the bill, did sink a shaft of the dimensions therein stated, about 130 feet from the channel of said Dog creek, but claim that said shaft was sunk in the development of a mining property of said company, situate across the channel of said Dog creek, and deny that by means of said shaft, or at all, respondents have diverted any of the waters of said creek. Various affidavits have been filed, in support of both the bill and answer, by the respective parties. I shall not undertake to review in detail these affidavits, but will simply state, so far as may be necessary to the pending hearing, the conclusions which I have drawn therefrom.

A temporary injunction in this suit would probably work less hardship than its refusal, and, where the title to property is in dispute, such a circumstance is often, on preliminary hearing, determinative in favor of the complainant. 1 Beach, Inj. §§ 307, 308; High, Inj. (3d Ed.) § 1508; *Hicks* v. *Compton,* 18 Cal. 206; *Real Del Monte Con. M. Co.* v. *Pond M. Co.* 23 Cal. 83; *Hunt* v. *Steese,* 75 Cal. 620, 17 Pac. 920; *Paige* v. *Akins,* 112 Cal. 401, 44 Pac. 666. Defendants, however, contend, among other things, that the shaft complained of was sunk, by the Wabash Mining Company, one of the defendants, in good faith, for the lawful development of its mining claim, without knowledge, actual or constructive when begun, that it would encounter subterranean water, and therefore if they were to concede all the other matters in dispute, the sinking of said shaft was not, nor will its maintenance be, an actionable injury—citing *Hanson* v. *McCue,* 42 Cal. 303, 10 Am. Rep. 299; *Cross* v. *Kitts,* 69 Cal. 217, 10 Pac. 409, 58 Am. Rep. 558; *Ditch Co.* v. *Crane,* 80 Cal. 184, 22 Pac. 76; *Painter* v. *Water Co.* 91 Cal. 82,

27 Pac. 539; *Railroad Co.* v. *Dufour,* 95 Cal. 616, 30 Pac. 783, 19 L. R. A. 92; *Sullivan* v. *Zeiner,* 98 Cal. 351, 33 Pac. 209, 20 L. R. A. 730; *Hargrove* v. *Cook,* 108 Cal. 79, 41 Pac. 18, 30 L. R. A. 390; *Gould* v. *Eaton,* 111 Cal. 639, 44 Pac. 319, 52 Am. St. Rep. 201; *Ocean Grove* v. *Asbury Park,* 40 N. J. Eq. 450, 3 Atl. 168; *Trustees* v. *Youmans,* 50 Barb. 319; *Haldeman* v. *Bruckhardt,* 45 Pa. 521, 84 Am. Dec. 511; *Appeal of Lybe,* 106 Pa. 634, 51 Am. Rep. 542; *People's Gas Co.* v. *Tyner,* 131 Ind. 280, 31 N. E. 59, 31 Am. St. Rep. 435; and *Wheatley* v. *Baugh,* 64 Am. Dec. 721.

This contention requires present settlement, because, if true in fact and sound in law, it forbids a temporary injunction. Is the contention true in fact? W. H. Daily, who for three years has been complainant's managing agent, states in his affidavit that, about the time the shaft was begun, he cautioned the superintendent in charge of said work not to cut the complainant's water flowing in Dog creek. This statement is uncontradicted, and, if the sinking of the shaft has produced the consequences against which the defendants, as shown by said statement, were cautioned, they are chargeable, I think, with prior notice of said consequences. With reference to the law of said contention, two things are to be observed:

First. It is a singular coincidence that, in *Trustee* v. *Youmans, supra,* strongly relied on by defendants, the court announces a doctrine subversive of their contention, namely:

"If the defendant's excavation or ditch drew the water from the plaintiff's spring, instead of stopping the flow of water from the defendant's land to such spring, then the defendant would be liable in this action." *Pixley* v. *Clark,* 35 N. Y. 520; 91 Am. Dec. 72. *Dickinson* v. *Canal Co.* 7 Exch. 282. *Cooper* v. *Barber,* 3 Taunt. 99.

Second. While the diversion of water from a well or spring owned by one person, through its percolation into a

shaft sunk on the land of another person, may be *damnum absque injuria,* such is not the case where, to the prejudice of antecedent rights, a like diversion is made from a natural water course. This distinction seems to be recognized in the following extract:

"This is, in fact, the pioneer case of its kind, so far as this court is concerned. There have been cases here in which injunctions were sought to prevent owners of land from digging or trenching or tunneling in their own premises, upon the ground that they were cutting off the subterranean sources of springs and streams, and they have been uniformly decided in accordance with the accepted doctrine as to rights in percolating waters,—the doctrine which defendants contend is applicable here. Those most nearly in point and most relied on are *Hanson* v. *McCue*, 43 Cal. 178; *Railroad Co.* v. *Dufour*, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92, and *Gould* v. *Eaton*, 111 Cal. 639, 44 Pac. 319, 52 Am. St. Rep. 201. But in none of these cases was there any evidence comparable to the evidence here of an underground stream. *Gould* v. *Eaton*, *supra*, comes nearer to this case than either of the others; but in that case it was found by the lower court that the portion of the water as to which there was any controversy was merely feeding the stream by percolation. And even in that case, which went as far as any case has ever gone in favor of the doctrine that percolating waters are a part of the soil and belong to the owner of the land, it was conceded, if not decided, that no water can be abstracted from a surface stream by tunneling beneath it, nothwithstanding the water must pass from stream to tunnel by percolation or filtration through the soil. In this case there is a great amount of evidence tending to prove that the defendants could not take any material quantity of water out of their land without abstracting an equivalent amount from the surface stream; the reason being that the water of the surface stream would necessarily sink into the loose porous material underneath to fill the voids occasioned by the drawing off of the water from below." *City of Los Angeles* v. *Pomeroy*, 124 Cal. 634, 57 Pac. 585.

The reason for the distinction probably is that the waters of a spring or well supplied by percolation are not subject to statutory appropriation or adverse user, while those of a water course may be acquired in either way.

In *Railroad Co.* v. *Dufour, supra,* the court holds, quoting from the syllabus:

"Where a spring is fed solely by percolating waters, which seep into it from swamp or wet land surrounding the same, and not by any running stream of water, there is no water at such spring to which the right of use can be acquired, either by statutory appropriation or by adverse user, and no action will lie in favor of one who has collected the water at the spring in a reservoir, and transmitted it by a pipe for use, against one who has diverted the water from the reservoir on his own land for irrigation and domestic use."

In *Trustees* v. *Youmans, supra,* the court says:

"The evidence tends to show that some of the plaintiffs had used the water in question for a period of more than 20 years, so that the plaintiffs to that extent claim a prescriptive right to its continued use in the same manner they have heretofore enjoyed such use. But reason and authority are alike hostile to such a claim as applied to this case. There can be no prescription where there is no adverse user, and there can be no adverse user without creating a right of action. Now, the use of the plaintiffs in this case was in no sense adverse or hostile to the defendant. It took nothing which he had any right to use or enjoy. It gave him no right of action. He was in no respect injured, nor was any right of his encroached upon. The defendant could not prevent the plaintiffs from using the waters that ran from the springs. Consequently no grant could be presumed from his silence or acquiescence. *Chasemore* v. *Richards*, 2 Hurl. & N. 183; *Dexter* v. *Aqueduct Co.*, 1 Story, 393, Fed. Cas. No. 3,864; *Dickinson* v. *Canal Co.*, 7 Exch. 282; *Roath* v. *Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Wheatley* v. *Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Frazier* v. *Brown*, 12 Ohio, 311; *Haldeman* v. *Bruckhardt*, 45 Pa. 519, 84 Am. Dec. 511."

Most, if not all, of the cases cited by defendants relate to wells or springs, although in *Chasemore* v. *Richards, supra,* a leading English case, the diversion was of percolating waters supplying a river. That decision, however, cannot be followed here, since the supreme court of California has declared the law differently, and as follows, quoting from the syllabus:

"The owners of the soil cannot divert any part of the underflow of subterranean water forming part of the stream, whether such water would or would not reach the surface stream of the river; nor can he divert percolating water, if the effect would be to cause the water of the stream to leave its bed to fill the void caused by such diversion." *City of Los Angeles* v. *Pomeroy, supra.*

A temporary injunction against the acts covered by the restraining order previously made herein will be issued upon complainant's giving a bond in the sum of $2,500, with good security, to be approved by the clerk of this court.

J. M. JOSEPH v. W. J. DAVENPORT ET AL.

(116 Iowa 268; 89 N. W. 108. Supreme Court. April 10, 1902.)

[1]**Adventurers in working lease.** A large number of persons took shares in a mining lease which was forfeitable for failure to work for 10 days. They received shares on their face liable to be sold if assessments were not promptly paid. After several assessments the lease became of great value. While under assessment several of the delinquent shares were sold. *Held*, that under such circumstances the sale of delinquent shares without notice or appraisement was valid.

[2]**Acquiescence. Rise in value.** Equity will not relieve against a forfeiture of stock where the shareholder has acquiesced in the same until a change of circumstances or conditions has arisen.

[3]**If the property is of a speculative nature** it is the duty of a complaining party to put forward his complaint at the earliest possible time.

Construction of clause as to time of sale of shares. In view of the necessity of prompt payments to comply with the terms of the lease and the manifest intent of the parties, the provision in the certificates that the sale of delinquent shares should "take place on the 10th day of the month following such failure," etc., should be construed to mean the 10th day of the same month after the default in payment of assessments.

Appeal from District Court, Union County; H. M. TOWNER, Judge.

[1]*Palmer* v. *Moore*, 20 M. R. 412; *Patterson* v. *Hewitt*, 11 N. Mex. 1, 66 Pac. 552.

[2]*Benton* v. *Ward*, 59 Fed. 411; *Anderson* v. *Luther Co.* 70 Minn. 23, 72 N. W. 820; *Kinney* v. *Cons. Va. Co.* 10 M. R. 457.

[3]After forfeiture accrued if the lessor condone and indulge he cannot afterwards arbitrarily declare forfeiture. *Hukill* v. *Myers*, 36 W. Va. 639, 15 S. E. 151.

Difficulties in working the mine and assent of the lessor to desultory working held under the facts of the case an excuse to lessee and to avoid forfeiture. *Price* v. *Black*, 126 Iowa 304; 101 N. W. 1056.

A lessee cannot cease mining under a phosphate lease where the ground is found to be pockety, without complying with the conditions of the lease requiring certain tests to be made on the arising of conditions of that class. *McGavock* v. *Virginia-Carolina Co.* 114 Tenn. 317, 86 S. W. 380

Action in equity for an accounting and to recover the profits on an interest in the Crescent Gold Mining Company, which interest plaintiff claims he owns and holds, and which defendants insist he forfeited by failing to pay certain assessments levied thereon. From a judgment dismissing the petition and taxing costs to plaintiff, he appeals. *Affirmed.*

JAS. G. BULL and TEMPLE, HARDINGER & TEMPLE, for appellant.

SPURRIER & MAXWELL, D. W. HIGBEE, and SULLIVAN & SULLIVAN, for appellees.

WATERMAN J. On July 30, 1897, one George W. Bilbo, as trustee, took a lease, containing an option to purchase, of a certain mining claim in the state of Colorado, from the Jack Pot Mining Company, its then owner. This lease provided that the lessee should perform a certain amount of work, viz., sinking at least 15 feet of shaft, or drifting or cross-cutting at least 20 feet, during each month of the term granted, and that a failure to work the premises for a period of 10 consecutive days should forfeit the rights of the lessee. We are not concerned with any of the other provisions of the instrument. Those we have given are material only as showing the necessity for prompt payment of assessments for carrying on the work. After procuring this lease, Bilbo formed a voluntary association of individuals, who were styled *cestuis que trustent,* and entered into a trust agreement, as it is styled in the instrument, but which, inasmuch as it is signed only by Bilbo, trustee, may, with more accuracy, be denominated, a declaration of trust. The *cestuis que trustent* are mentioned as signing the agreement as party of the first part, and are described as owners of certain certificates or shares issued by Bilbo as trustee, each of which represents a 1-30 interest in the leased property. It was provided

the certificate holders should pay the sum of $10 on each share on the 4th day of each month. The trustee was directed to give notice by letter on the 25th of each month to every certificate holder, of such assessments. It was also stipulated that said payments were for the purpose of developing the mine, and to meet other necessary expenses. In case of a failure to pay the assessment on any certificate, it was provided such share may be sold "on the 10th day of the month following such failure;" sale to be made by the trustee for the highest and best price he can obtain on said day. A further provision, made the certificate assignable, if assessments were not in default.

With this agreement as a basis, Bilbo formed the association of persons mentioned, at and about Creston in this state, to whom certificates were executed. Originally there were 36 certificate holders, but the number was afterwards reduced to 30. Each certificate provided that the holder was entitled to an undivided 1-30 interest in the leased property, and was entitled, to receive any profit or advantage "that may come into the hands of said trustee." It contained the same provision as the declaration of trust in relation to the right of the trustee to sell the certificate for a default of the holder in paying assessments. One Stewart was originally the owner of a share. On February 15, 1898, for a consideration of $5, he sold and transferred the same to plaintiff. Some time after the organization of this association, and before plaintiff acquired his share, it became necessary to increase the assessments, and at a meeting attended by all the shareholders, including Stewart, plaintiff's assignor, it was unanimously agreed that the monthly expenses, whatever they might be, should thereafter be divided into 30 equal parts, and the holder of each certificate should pay one such part, as the assessment on his share. Under this arrangement, the assessments increased considerably, beginning with the month of September, 1897. For the month of Feb-

ruary, 1898, the assessment was $25; March, $20; April $20; May $20; and June $26. The most strenuous efforts were required from time to time, by the trustee, to secure payment of the assessments due and perform the required work on the property, necessary to prevent a forfeiture of the lease. Certificate holders lost heart and ceased to pay. About the beginning of the year 1898, the prospect was unusually gloomy. At the end of the month of March, when the pay-roll of that month was reported, a number of shareholders refused to pay assessments. Early in April a telegram was received from the mine, that the men had refused to work for several days because they had not been paid for their March work. The money was borrowed to pay them, and they were induced to go to work just in time to prevent a forfeiture of the lease.

Plaintiff refused to pay his March assessment, he says not unconditionally; nevertheless, he admits the money was not forthcoming on demand. On the 11th day of April, the 10th falling on Sunday, plaintiff's share, with four others which were delinquent, were sold. There was no public bidding, for the shares had no value, but at a meeting called for the purpose of disposing of them it was sought to find some person who would take them, paying the assessment in arrear and assuming those to be thereafter levied. The five shares delinquent were finally so disposed of, Bilbo taking plaintiff's share. Bilbo then paid the March assessment, $20, and paid a proportionate share of other bills due, amounting to $6.90. He paid the April assessment of $20, and thereafter offered to return the share to plaintiff without charge, if the latter would keep up future assessments. Plaintiff refused. Bilbo, after this, induced defendant Davenport to take the share and pay subsequent assessments, and that is how the latter becomes personally a defendant herein. Other assessments for May and June were paid by Bilbo or Davenport. In the latter part of June, 1898, the

mine developed into a producing property. The company was incorporated as the Creston Gold Mining Company. Up to the time of trial in the court below something over $12,000 in dividends had been paid on each share. This action was begun in October, 1899.

I. Plaintiff asserts that the first organization of which he was a member was a co-partnership. Perhaps it was, for it has many of the incidents of a joint-stock company, though it differs in one particular from any such companies to which our attention has been called—in that title to its property or assets was vested in a trustee. But the matter is of no consequence. Whatever the character of the original association, authority was given the trustee to sell the shares for non-payment of assessments, and the exercise of this power was as valid as was that of assigning shares, and it was by or through such an assignment, as we have already seen, that plaintiff acquired his certificate.

II. Certain objections are made to the methods pursued in accomplishing the forfeiture. It is said no written notice was given plaintiff of the assessment; the assessment was for more than $10; there was no notice of the sale given plaintiff, nor advertisement thereof, nor appraisement of the property. Some other matters are suggested, but not argued; so we shall not notice them. As to the increase in assessment, this was agreed to by all parties before Joseph became a member. That he knew of it when he took his certificate is shown by the fact that he paid the February assessment of $25, and made no objection to the assessment for March on the score of amount. Furthermore, he has never offered to pay even the amount of the assessments which he now admits were legal.

With relation to the other matters, it may be said plaintiff knew of the amount of the March assessment and admits that demand was made upon him therefor. It also appears that he was verbally notified of the date of the forfeiture sale.

While nothing is said in the articles about the manner of sale, its purpose and object, together with the date fixed for it, indicate that it was to be without the formality of appraisement, and without the delay of advertisement provided for in sales on execution. The sale was to "take place on the 10th day of the month following such failure," etc. This language is clear when the purpose is considered. Ten days' delay in the work on the property would forfeit the lease; prompt payments by certificate holders were necessary in order to continue the work, for that was the only source of revenue. To delay the sale of a certificate upon which an assessment was delinquent for a month would result almost inevitably in the loss of the property. Therefore, this clause is to be construed as the 10th day of the same month after such failure, and not the 10th day of the following month. But if the sale was prematurely made, and if there were irregularities in making an assessment and sale, of which plaintiff might have been heard in timely complaint, we think he has lost such rights by his laches. Plaintiff knew of the March assessment, and declined to pay it. He knew of the date of the sale of his stock. After the sale, he refused to receive the certificate and assume future obligations, when a return of it was offered. At that time the certificate represented only an obligation of indebtedness, and he did not care for it. He knowingly permitted the purchaser to go on paying assessments to save the lease, and only when it became manifest the certificate was of value, some 18 months after forfeiture, did he make claim to its ownership. Even now he does not tender the amount of the assessments paid on his stock. There seems no equity in his favor. Laches is an equitable estoppel. *Evans* v. *Montgomery,* 50 Iowa 327. The doctrine is enforced in all cases where there has been an omission to assert a right in conjunction with lapse of time causing prejudice to an adverse party. *Blackman* v. *Wright,* 96 Iowa 541, 65 N. W. 843; *Horr* v. *French,*

99 Iowa 73, 68 N. W. 581; *Bacon* v. *Chase,* 83 Iowa 521, 50 N. W. 23.

These cases are cited only as announcing the general nature of this equitable doctrine. The rule may be narrowed, for the purposes of the present case, into this statement: Equity will not relieve against a forfeiture of stock, where the shareholder has acquiesced in the same until a change of circumstances or conditions has arisen. Thomp. Corp. § 1807; 2 Pom. Eq. Jur. 965. In *Sayre* v. *Heat Co.* (Cal.) 7 Pac. 437, certain shares of stock belonging to plaintiff's assignor were sold for nonpayment of assessments and bought in by the corporation. Afterwards they were tendered back on condition that the assessment should be paid. The owner refused to receive them. At this time the stock was worth but little. Subsequently it became profitable, and action was brought to recover the shares. Plaintiff was denied relief because of his acquiescence in the sale. *Hayward* v. *Bank,* 96 U. S. 611, 24 L. Ed. 855, is even a stronger case, or, perhaps we should say, states a phase of the rule more pertinent to the case at bar. In that case mining stocks had been deposited as collateral and were sold by the pledgee. Plaintiff was informed of the sale, and did not object. The stocks thereafter increased in value, and action was brought to redeem. *Held,* that delay in bringing suit—about 3½ years—barred his rights, the court saying: "Without reference to any statute of limitation, equity has adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case. The question of acquiescence or delay may often be controlled by the nature of the property which is the subject of litigation. A delay which might have been of no consequence in an ordinary case may be amply sufficient to bar relief when the property is of a speculative character, or is subject to contingencies, or where the rights and liabilities of others have been in the meantime varied.

If the property is of a speculative or precarious nature, it is the duty of a man complaining of fraud to put forward his complaint at the earliest possible time. He cannot be allowed to remain passive, prepared to affirm the transaction, if the concern should prosper, or to repudiate it if that should prove to his advantage." See also, to substantially the same effect, *Twin Lick Oil Co.* v. ***Marbury,*** 91 U. S. 587, 23 L. Ed. 328.

The trial court made a proper disposition of the case, and ***its judgment is affirmed.***

HENDRIE & BOLTHOFF MANUFACTURING CO. v. HOLY CROSS GOLD MINING CO. ET AL.

(17 Colorado App. 341; 68 Pac. 785. Court of Appeals, April 14, 1902.)

Sale contract requiring improvements liens the fee. Where under an executory contract for the sale of a mine the intending buyer is obliged to place improvements upon the property the party furnishing the materials for such improvements under such contract has a lien upon the real estate as well as upon the improvements.

Appeal from District Court, Arapahoe County.

Action by the Hendrie & Bolthoff Manufacturing Company against the Holy Cross Gold Mining & Milling Company and another. From a judgment for the defendants, plaintiff appeals. Reversed.

Employee of contractor drilling oil well has lien. *Gibbs Mfg. Co.'s App.* 100 Pa. 528.

Liability where work done by contract. *Rosina* v. *Trowbridge*, 20 Nev. 105; 17 Pac. 751.

A contractor has a lien for each employee's labor. *Malone* v. *Big Flat Co.* 76 Cal. 578; 18 Pac. 772.

Owner held for work done by lessee holding option. *Eaman* v. *Bashford*, 4 Ariz. 199; 37 Pac. 24. *Contra*, *Block* v. *Murray*, 12 Mont. 545; 31 Pac. 550. *Maher* v. *Shull*, 11 Colo. App. 322; 52 Pac. 1115.

There can be none for work done under employ of hostile title. *Idaho Co.* v. *Winchell*, 6 Idaho 729; 59 Pac. 533.

Where credit given to the option-holder no lien against the fee. *Steel* v. *Argentine Co.* 4 Idaho 505; 42 Pac. 585.

Work done on a mine is not an "improvement." Party working for licensee has no lien. *Jurgenson* v. *Diller*, 114 Cal. 491; 46 Pac. 610.

Mechanic's lien good against purchaser by executory contract and his vendor. *Colo. Works* v. *Taylor*, 12 Colo. App. 451; 55 Pac. 942.

Lien on stamp mill does not extend to the lode. *Id.*

Mechanic's lien allowed against owner for improvements done by intending purchasers. *Hines* v. *Miller*, 19 M. R. 609.

Miner working for lessee has none against owners under the Colo-

R. D. THOMPSON and MR. CHARLES J. BLAKENEY, for appellant.

CARPENTER & MCBIRD, for appellees.

GUNTER, J. Appellee Howe, as owner, leased to Kimball and Havens, for a term of three years, certain mining property with the buildings, mills, machinery, tools and other equipments theretofore used in mining the same. The lease provided an option of purchase. Obligations of the lessee, imposed by the lease and pertinent to this ruling were to mine, operate and develop the property; to keep books of account wherein should be set down in detail all the expenses of operation, the amount paid for each item of mining supplies, tools, repairs and improvements, and to keep all build-

rado Act of 1895. *Wilkins* v. *Abell*, 26 Colo. 462; 58 Pac. 612. *Schweizer* v. *Mansfield*, 14 Colo. App. 236; 59 Pac. 843. *Little V. Co.* v. *Ingersoll*, 14 Colo. App. 240; 59 Pac. 970.

No lien where miner works for purchaser with deed in escrow. *Hadley Co.* v. *Cummings* (Ariz.); 64 Pac. 443.

No lien where work done for lessee. *Griffin* v. *Hurley* (Ariz.); 65 Pac. 147. *Morrell Co.* v. *Princess Co.* 16 Colo. App. 54; 63 Pac. 807.

No lien for work done for a vendee prospecting the property. *Reese* v. *Bald Mt. Co.* 133 Cal. 285; 65 Pac. 578.

No lien although alleged that the lessor and lessee corporations were practically identical. *Antlers Co.* v. *Cunningham*, 29 Colo. 284; 68 Pac. 226.

There is no lien for work done for a lessee; and if part of the contract required the building of a mill to belong to the lessor the lien attaches only for work or materials on or for the mill strictly. *Id.*

Labor done for a party who has to do certain work for an interest in the claim is not entitled to a lien. *Maher* v. *Shull*, 11 Colo. App. 322; 52 Pac. 1115.

No lien allowed for fuel or current supplies of the mine. *Holter Co.* v. *Ontario Co.* 20 M. R. 518.

A watchman is not entitled to. *Williams* v. *Hawley*, 144 Cal. 97; 77 Pac. 762.

Party hired by one holding possession under executory contract for purchase of the mine has no lien. *Id.*

ings, machinery and structures in reasonable repair during the term.

The lease further provided for a forfeiture of the lease and option in the event of a breach of any of the covenants thereof. The lease ran from October, 1892. September, 1893, it was extended for one year. July, 1894, it was assigned to Davis, trustee, and August, 1894, was by him assigned to the Holy Cross Gold Mining and Milling Company. This company immediately after the assignment to it, entered into possession of the demised premises and remained in possession thereof until October, 1897. July, 1895, a contract between Howe and the Holy Cross Company was entered into extending the original lease and contract three years, whereby Howe agreed to sell and the company to buy the demised premises, and to make payment therefor on or before October 1, 1899. Until the determination of this contract by time, payment or forfeiture, the company covenanted to mine and operate the premises, and to devote all of the proceeds of ore extracted therefrom to the permanent development of the property, unless the proceeds so realized were in excess of the amount that could be so expended, in which event such surplus was to be divided between the vendor and vendee.

Except as modified by this extension contract, the terms of the original lease and contract were adopted as a part of the new agreement. Under the new agreement the future relation between the parties thereto was that of vendor and vendee.

September, 1897, the Holy Cross company having violated the terms of the new contract, Howe declared the contract forfeited and resumed possession of the property covered thereby, taking possession also of all improvements thereon.

The Holy Cross company while in possession of the premises under the contract to purchase, of July, 1895, and while mining and operating the same for "the sole purpose of de-

veloping and improving the same, and to advance and carry out the objects and purposes for which the said property is valuable only, and as a part of the mining enterprise embraced in all of the demised premises," as admitted by the answer, purchased and attached to the property, and used in operating the same, certain mill fixtures and an ore crusher. It also for the purpose of operating the property and developing the same, under the terms of the extension contract —the contract to purchase—bought for the property ore cars, drills and drill supplies. A lien was sought against the interest of the owner, Howe, in the premises for the mining equipments and supplies so furnished. This the lower court denied. From the ruling is this appeal. There was no evidence, the above facts appear from the pleadings.

From the foregoing facts it appears that Howe agreed to sell and the company to buy the premises; that the company was authorized by, and obligated to the vendor to mine, operate and improve the property; that such obligation was one of the conditions of the contract of purchase; that all proceeds of the mining were to go into the improvement of the property; that after the original lease had become a contract to purchase, in carrying out such contract the Holy Cross company made the improvements and purchased the supplies for which the lien is claimed, and for which such company is indebted to appellant.

Considering the character of the property leased, the apparent manner, from its equipments in which it had prior to the lease and contract been operated, the length of the terms for which the contracts to the original lessee and the assignee ran, the fact that the property was to be kept up, the parties must have contemplated that in operating and developing the property it would be necessary to purchase mill fixtures and other mining equipments and supplies. In carrying out the obligation to operate, develop and improve this property it was as necessary to have mining supplies and equipments as

it is necessary to have building materials and workmen in carrying out a contract to erect a building upon land. There was authority by the vendor and an obligation by the vendee to make the improvements in question, such obligation was one of the conditions of the contract to purchase.

The facts bring this case within *Shapleigh* v. *Hull,* 21 Colo. 419, 41 Pac. 1108; *Colorado Iron Works* v. *Taylor,* 12 Colo. App. 451, 55 Pac. 942.

In first cited case Hull agreed to sell and Leimbach to buy certain lots, upon which the latter agreed to erect houses. Materials were purchased for construction of such houses and a lien claimed therefor against the interest of Hull in the land, he having taken possession of the premises and improvements on account of the forfeiture of the contract of sale. The court said: "The district court by its decree limited the operation of the liens of the mechanics and materialmen to the structure itself, and refused to extend the same to the lots. This would be proper if Hull had merely sold the lots, leaving it with Leimbach to improve them or not, as he might elect, as the rule is well settled that the lien in such case attaches only to the interest of the one who causes the improvement to be made; but in this case, by the contract of sale, Leimbach was not only authorized to construct the houses, which he afterwards did construct, but he was required so to do. In other words, the building of the houses was not only authorized, but enjoined, by Hull, the owner of the land, by the very terms of the written contract.

"Under these circumstances the interest of the vendor in the real estate, as well as that of the vendee, became subject to the liens of those furnishing the labor and materials for the construction of the houses under the contract of sale."

In the Taylor case, *supra,* an original lease contained an option to purchase; the option merged into a contract by the one party to sell and by the other to buy. As a condition of the contract the proposed purchaser was obligated to place

certain machinery upon the property involved. In pursuance of the contract the machinery was purchased and placed upon the property. The option contract was forfeited and the vendor took possession of the property in its improved condition. The contractor furnishing the material claimed a lien upon the interest of the vendor in the land for the amount due upon the machinery. The court held it entitled to the lien.

We think the lower court erred in failing to decree the lien herein.

The above facts appear from the pleadings. No reason appears for a new trial.

The judgment will be reversed with instructions to the court to enter judgment for plaintiff for the amount prayed, and for a lien of such judgment upon the Pelican Extension and Little Mollie lodes, and the mill located thereon.

Reversed.

FRED J. WILKINS v. MONSON CONSOLIDATED SLATE CO.

(96 Maine 385; 52 Atl. 755. Supreme Judicial Court. April 15, 1902.)

Sic utere tuo is the maxim which controls the use of their respective lands between a quarry owner and his neighbors.

Where land was conveyed with knowledge that it was to be used as a quarry the vendor, still adjoining owner, could not complain of the noise of blasting or any legitimate use of the quarry, but is not estopped to complain of blasting carelessly conducted so as to throw rocks on his adjoining premises.

Evidence of further trespasses since the suit was begun was not admissible.

[1]**Anticipated injuries.** It cannot be assumed that defendant will continue to repeat the wrong or trespass, and damages for anticipated injuries cannot be allowed.

Exceptions from Supreme Judicial Court, Piscataquis County.

Action on the case by Fred J. Wilkins against the Monson Consolidated Slate Company. Verdict for plaintiff, and both plaintiff and defendant file exceptions. Exceptions overruled.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and POWERS, JJ.

[1]In a contract between Natural Gas Company and a Glass Manufacturing Company, prospective profits cannot be considered. Measure of damages on breach of such contract; failure to produce the gas considered. *Paola Gas Co.* v. *Paola Glass Co.* 56 Kans. 614; 44 Pac. 621.

Measure of damages for failure of oil lessee to sink more wells and work to full capacity of the ground. Defendant held to value of what might have been produced less cost and plus interest. *Bradford Oil Co.* v. *Blair*, 113 Pa. 83; 4 Atl. 218.

Stipulation for liquidated damages for nonperformance of covenants of oil lease upheld on account of difficulty in fixing the actual damage. *Escondido Oil Co.* v. *Glaser*, 144 Cal. 494; 77 Pac. 1040.

H. HUDSON, for plaintiff.

J. B. PEAKS, for defendant.

STROUT, J. This case comes up on exceptions by both parties. It is a suit to recover damages resulting from rocks thrown upon plaintiff's land by blasting in defendant's quarry and injury from water pumped from the quarry and allowed to flow upon plaintiff's land. The quarry, which lies on the opposite side of the road from plaintiff's residence, was conveyed by the plaintiff to defendant's grantor with knowledge that it was to be used as a quarry.

Defendant's exceptions: An instruction was asked that plaintiff, having conveyed the premises occupied by the defendant with knowledge that they were to be opened and used as a quarry, he was estopped from claiming any damages arising from the proper use of the quarry as a quarry, when carried on in the ordinary, usual, and proper business of a slate quarry. This request was refused by the presiding justice, who instructed the jury that the plaintiff could "maintain the action, providing he proves damages, although he sold the land to the predecessor in title of the defendant with the understanding that it was to be used as a slate quarry," and that it was not necessary for the plaintiff to prove negligence or carelessness on the part of the defendant. The defendant excepts to the refusal to instruct, and to the instruction actually given.

The owner has a right to use his property in any manner he pleases, provided such use is lawful and inflicts no injury upon another. The maxim *"Sic utere tuo ut alienum non laedas,"* expresses not only the law, but the elements of good neighborhood and mutual right. The fact that plaintiff granted the quarry, to be used as a quarry, cannot be regarded as conferring a right upon defendant to make an illegal use of the quarry to his detriment, nor as a release of damages

resulting therefrom. With suitable precautions, blasting can be done in the quarry without throwing rocks upon plaintiff's premises. Such noise as necessarily results from blasting may be supposed to have been considered at the time of the grant, and been an element in making the price. But the unnecessary throwing of rocks or other debris upon plaintiff's land cannot be so regarded. The plaintiff might well rely upon the assumption that defendant would conduct his operations in compliance with the law, and with that regard to his rights which the law imposes. The elements of estoppel do not exist upon the facts of this case. *Lyman* v. *Railroad Corp.,* 4 Cush. 288; *Wilson* v. *New Bedford,* 108 Mass. 261, 11 Am. Rep. 352. The cases of *Vickerie* v. *Buswell,* 13 Me. 289, and *Francis* v. *Milling Corp.,* 4 Pick. 365, cited by counsel, are not applicable to the facts of this case. These principles are elementary. The instructions given were in accordance with them.

Plaintiff's exceptions: The writ bore date January 24, 1900. Plaintiff introduced evidence tending to show that from December 1, 1898, to the date of the writ, rocks were blasted from the quarry by defendant, and thrown upon the dwelling house of plaintiff and upon his land. He also offered evidence to show, that, between the date of the writ and the time of the trial, rocks had been so thrown upon plaintiff's land by defendant, which was excluded and exception taken. It was claimed that such evidence tended to show that rocks were so thrown prior to the date of the writ,—but this was clearly a *non sequitur.* Evidence of a wrong or trespass of this kind at one time has no legitimate tendency to prove a like wrong or trespass at some prior time. The offered evidence was clearly inadmissible.

Plaintiff also claimed to recover in this suit not only damages to the date of the writ, but probable future damages. The court instructed the jury that no damages subsequent to the date of the writ could be recovered. That this instruction

was correct is too plain for argument. *Non constat* that any more rocks would ever be thrown upon plaintiff's land. The quarry might not be operated, or precautions might be taken to prevent a recurrence of the injury complained of. There was no basis upon which future damages could be assessed. If they occur, it is a matter for a subsequent suit.

Exceptions of plaintiff and of defendant overruled.

WILLIAM F. GERKINS ET AL v. THE KENTUCKY SALT CO.

(23 Kentucky L. R. 2415; 67 S. W. 821. Court of Appeals. April 16, 1902.)

[1]**Parties in interest not joining in a lease** are entitled against a party mining under a lease obtained in good faith from some of them, to damages only to the extent of actual value of their property taken, that is to mere compensation, to be reached by assessing a fair royalty and without considering the value of improvements placed by the lessee.

Apportionment where lessee works several wells. Where lessee of a gas well made a pipe of four times the capacity of the leased well, intending to use it in connection with other wells, he is entitled on an accounting to only one-fourth of its cost.

[2]**What the lessee received for the gas is not its value,** on an accounting —all his mining expenditure has to come out of his sales.

Value, how proved. The value of the use of the well must be ascertained from the testimony of those acquainted with the facts, who may testify from their knowledge of the value of the use of such wells, where the lessee provides all the appliances necessary in caring for and transporting the gas.

Appeal from Circuit Court, Meade County.

Action by William F. Gerkins and others against the Ken-

[1]Where a lessee had the right to take coal as and when he pleased at so much royalty per bushel the lessor cannot recover damages against a party interfering with his lessee, the lessor's injury being too uncertain and remote. *Rankins' Appeal*, (Pa.) 16 Atl. 82.

Where lessor let oil leases to the injury of prior lessee on same tract. *Duffield* v. *Rosenzweig*, 144 Pa. 520; 23 Atl. 4.

For a lessor to recover for failure to work he must show that coal could have been mined to a profit. *Colorado F. & I. Co.* v. *Pryor*, 19 M. R. 544.

Measure of damages against lessee for breach of covenant. *Cleopatra Co.* v. *Dickenson*, 28 Wash. 211; 68 Pac. 456.

[2]Where parties take out ore as mortgagees in possession or equitable owners they are entitled to all expenses of working and compensation for improvements. *Wasatch Co.* v. *Jennings*, 14 Utah 221; 46 Pac. 1106.

tucky Salt Company and others for a mandatory injunction and for other relief. Judgment for defendants, and plaintiffs appeal. Reversed.

W. W. THUM, ERNEST MACPHERSON, and HAZELRIGG & CHENAULT, for appellants.

McDONALD & McDONALD, for appellees.

O'REAR, J. A life tenant, who was also one of six remainder-men, of a tract of 61 acres of land in Meade county, executed a lease to appellee Kentucky Salt Company's remote vendor, attempting to convey the right to explore for gas and other minerals on this land, and to take and use such as might be found. On appeal this court held (100 Ky. 734, 39 S. W. 444, 66 Am. St. Rep. 370) that the conveyance was void, because the life tenant could not, nor could one of the several joint owners, convey this right. The specific relief asked for was an injunction to close the well. This the court declined to do, upon the ground that it would entail a great loss on appellees, and in all probability would not have benefited appellants, because they could not have entered on the land or worked the mines, and, when they should have eventually come into the remainder, their gas would likely have been pumped off through the wells of their neighbors. The court felt constrained to direct the following relief: That after the company, the lessee, had been reimbursed for its improvements, unless that had already occurred, appellants, the remainder-men, not joining in the conveyance, should receive a fair royalty for the operation of the well by the company. This appeal involves the accounting required under the opinion above referred to. The circuit court refused appellants any relief. This was error. The questions of estoppel, and of the right of one joint tenant or a life tenant to exercise or convey the privilege sought to be conveyed in this case, are

matters adjudicated, so far as the parties to this record are concerned. The sole question left open was the matter of accounting directed by the former opinion. Its method was, we feel, sufficiently outlined. That is, that the lessees should be reimbursed out of their receipts from use or sales of gas for cost of developing and improving the property. Having been so reimbursed, they should then pay to appellants their proportion (that is, five-sixths) of the reasonable value of the use of the well. The record now discloses that after the rendering of the former opinion the appellees ceased to use the well until they had made a satisfactory arrangement with all parties in interest for its future use. Therefore the sole question is to find the value of improvements, and the value of the use to be accounted for.

From the proof we find that it cost $1,200 to sink this well, and that the same was a reasonable sum for the work. Necessary buildings and meter cost $600. A pipe line was constructed from the main line used by appellee Kentucky Heating Company to connect with this well and other wells in that locality. The dimensions of this line were about four times greater than necessary to accommodate the flow from this well. This size pipe was provided evidently to accommodate other wells besides this one. In fact, three other wells were thereafter so connected. The cost and value of this line was $3,500. One-fourth of this sum should have been credited as the proportion chargeable to this well; that is, $875. Appellee Kentucky Salt Company had received as royalty for the gas from this well and another, not on the land in dispute, the sum of $4,206, within the period covered by the litigation. The evidence is that three-fourths of this sum represents the price received for the gas taken from the well in dispute. It is therefore apparent that appellee Kentucky Salt Company had alrady been reimbursed for its improvements, within the language of the opinion in 100 Ky. 734, 39 S. W. 444, 66 Am. St. Rep. 370. The sum received by the Kentucky Salt

Company from the Kentucky Heating Company, to whom it had sold the gas,—the latter company having arrangements to pipe it to Louisville, where it was sold to that company's customers,—is not taken as a criterion of the value of the gas used by the Kentucky Salt Company. It is adopted merely to ascertain whether the Kentucky Salt Company had been reimbursed for its improvements as required by the former opinion. Finding that it had been, we then come to the question as to what in fact was the fair value of the gas taken from appellants' lands by appellee Kentucky Salt Company during the period in controversy.

It is earnestly argued for appellants that the sum received by appellee Kentucky Salt Company must be adopted as the true value of the gas, because it actually sold for that. We are unable, however, to agree with this contention. To begin with, it is not necessarily true, and furthermore it is proved by the record to have been untrue. If the Kentucky Salt Company had made an improvident contract for the sale of this gas, and had sold it for less than it was actually worth, it could not have escaped liability for its real value upon the ground that it had not actually received that value. The true inquiry is the actual value of the thing in dispute. To arrive at that value (the market or selling value) in this case, the cost of exploiting the product and providing for its care and use should be taken into consideration. It was therefore suggested in the original opinion to provide for reimbursement out of the proceeds of the gas taken. The existence of these improvements—the paraphernalia for caring for and utilizing this gas—gave the gas an additional value to that possessed by it in its crude and uncontrolled state. The owners of the land were entitled only to the crude material, unenhanced by the additional circumstance of provision for its practical use as made by appellees. In 26 Am. & Eng. Enc. Law, p. 818, the rule as to damages for conversion is thus stated: "As a general rule the measure of the damages

is the value of the property at the time of the conversion, with legal interest thereon from the date of the conversion to the entry of judgment, subject to exceptions in those cases where exemplary or consequential damages are proved." Exemplary damages are not allowed in such cases where there has not been a willful trespass or taking, or fraudulent conduct. In this case it is conclusively shown that the Kentucky Salt Company and its vendors all acted in the utmost good faith, in the belief that they had the complete title to the land in controversy, at and during all of the times in question. In actions involving somewhat similar conversions, where the subject-matter was coal, oil, timber, and the like, the trend of the decisions seems to be that where the trespasser, through inadvertence or honest mistake as to his title, committed the act, then the course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie. *Livingstone* v. *Coal Co.*, 5 App. Cas. 25; *Jegon* v. *Vivian,* 6 Ch. App. 742; *Waters* v. *Stevenson,* 13 Nev. 157, 29 Am. Dec. 293; Sedg. Dam. 591-670; *Ragland* v. *Taylor,* 7 Ky. Law Rep. 163. After all, it must be the sole purpose of courts in such cases as the one at bar to afford relief from the actual injury done the complainant, and that relief is given when he is compensated for the thing lost or taken. Compensation, then, must be the measure of his damages. To compensate him is to give him in money what would be the fair equivalent of the thing taken as at the time and at the place of the conversion, in the condition it was in, without the aid of expenditure of labor or means upon it by the converter. This value must be ascertained by the testimony of those acquainted with the facts, who may testify from their knowledge of the salable values of the same or similar commodities in the same locality as of or about the time of the conversion. From such evidence in this

record we find such values to have been reasonably not exceeding $200 per annum for the use of such wells, where the lessee provided all the appliances necessary in caring for and transporting the gas. The use of this well by appellees began in December, 1891, and ceased in March, 1897. For about 18 months of that time, however, it was closed. We therefore find that appellants should have been allowed as royalty the sum of $667, which is five-sixths of the royalty earned for the time stated, with interest for the average time from July 1, 1894.

The judgment is reversed, and the cause is remanded, with directions to enter a judgment in accordance with this opinion.

STATE EX REL. HEINZE ET AL. v. DISTRICT COURT ET AL.

(26 Montana 416; 68 Pac. 794. Supreme Court. April 21, 1902.)

That the case is not at issue does not preclude the court from making an order for inspection.

Right to follow developments. That the petitioning party has complete maps up to the commencement of the suit is no reason why it should not have an order for inspection of further work.

Surface ground above and beyond point of controversy. Order allowing the party working within its own lines on the dip to enter the surface openings of the apex of the claimant on its own ground upheld.

An order should always be limited to the inspection of those openings only which avail in the present controversy.

An inspection on the strike beyond the point in controversy may be essential to determine the continuity of its direction as well as the angle of the dip.

The fact that the premises are under injunction is no reason for refusing an inspection.

Inspections from time to time, in this case weekly, under reasonable restrictions by means of two designated employees are usual and proper.

Original petition for a writ of supervisory control, by F. Augustus Heinze and others, against the district court of

See notes to *Peo.* v. *DeFrance*, 22 M. R. 61.

For further inspection orders in same litigation see *State* v. *District Court*, 29 Mont. 105; 74 Pac. 132.

It is not error to refuse to send the jury to the mine under the statute requiring such examination, where one party to an adverse claim suit has made out no case. *McMillen* v. *Ferrum Co.* 32 Colo. 38, 74 Pac. 462. *Connolly* v. *Hughes*, 18 Colo. App. 372; 71 Pac. 681.

A party to the suit may be appointed a guide to show the jury the mine. *Wilson* v. *Harnette*, 32 Colo. 172; 75 Pac. 395.

The court will not review the action of the trial judge in refusing a jury view of the premises. *Maloney* v. *King*, 30 Mont. 158; 76 Pac. 4.

Purchasers pending litigation are bound by inspection orders made by the court. *Heinze* v. *Butte Co.* 129 Fed. 274.

Corporate officers are personally liable for obstructing such orders. *Id.*

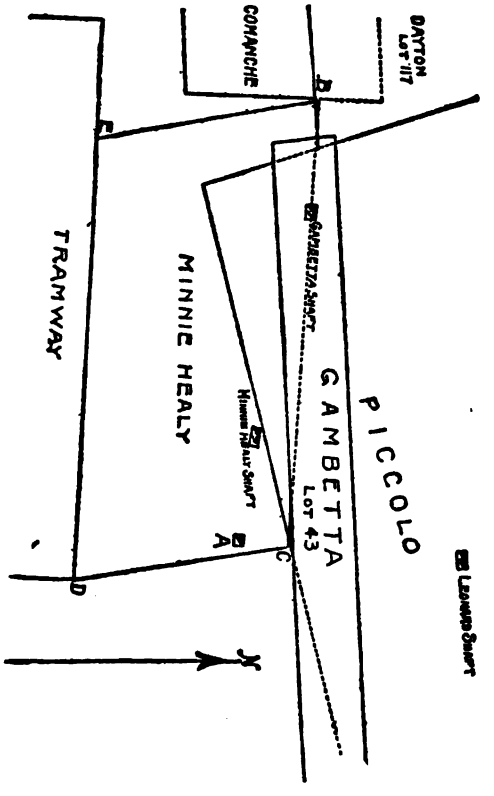
the Second judicial district and another. Modified and granted.

McHATTON & COTTER, J. M. DENNY, and TOOLE & BACH, for relators.

FORBIS & EVANS, for respondents.

BRANTLY, C. J. Application for writ of supervisory control. On March 30, 1901, F. Augustus Heinze and the Johnstown Mining Company, a corporation, filed their complaint in the district court of Silver Bow county against the Boston & Montana Consolidated Copper & Silver Mining Company, alleging, in substance, that they were the owners of the Minnie Healy mining claim, in Summit Valley mining district, Silver Bow county, Mont., and of certain veins having their tops or apices therein; that the defendant, by underground workings made within and from adjoining property and premises in its possession and control north of plaintiff's premises, had entered beneath the surface of the Minnie Healy claim, particularly that portion of the claim lying east of the west end lines of the Piccolo and Gambetta claims; that by means of certain crosscuts, tunnels, etc., defendant had cut into the veins or lodes belonging to the plaintiffs, and was engaged in removing ore therefrom; that the defendant had entered into the possession of these portions of the Minnie Healy veins belonging to plaintiffs, and had ousted and ejected plaintiffs therefrom; and that the defendant asserted title thereto adversely to the plaintiffs, but that such claim of title was without any foundation in fact. The complaint concludes with a prayer that the plaintiffs be decreed to be the owners and entitled to the possession of said veins and ore bodies throughout their entire depth, even though in their descent into the earth they so far depart from a perpendicular as to pass beyond the bound-

ary of the Minnie Healy and into the ground of the defendant; that defendant be required to set forth its adverse claims in order that they might be adjudged to be without foundation; that the title of the plaintiffs be forever quieted; and that the plaintiffs have general relief. On August 17th



thereafter, upon application of plaintiffs, on the complaint, supported by affidavits, the court issued an order requiring the defendant to appear and show cause on August 31st, why an injunction should not issue to restrain it from removing any ores from the disputed veins and ore bodies pending the suit, and in the meantime to cease its opera-

tions until a hearing could be had under the order. The order also restrained the defendant from mining and extracting ore from certain portions of a lode within its own ground north of the south side line of the Piccolo, to which the plaintiffs claimed title by virtue of their extralateral rights upon the veins described in the complaint.

The situation of the claims of the respective parties, and the subject of the controversy between them, may be readily understood by reference to the subjoined diagram. The Piccolo and Gambetta claims to the north belong to the defendant. The portions of the surface of these claims which conflict with the Minnie Healy, as its location was originally made, are excluded from the Minnie Healy patent, and there is no question as to surface rights. The legal title to the Dayton claim is in the defendant corporation, but an interest therein is claimed by F. Augustus Heinze and his brother, Arthur P. Heinze. The ore bodies in controversy include those found on the 800 and 900 levels in the triangular portion of the Piccolo claim immediately to the north and in the neighborhood of the south line of the Gambetta, the plaintiffs asserting that these belong to the veins which have their apices to the south in the Minnie Healy and pass through the east and west end lines of the claim. Their claim is therefore based upon an asserted right to follow these veins on their dip toward the north, and into the ground of the defendant. Though it does not appear at what angle the Minnie Healy vein dips into the earth, it does distinctly appear that the purpose of the action is to settle the controversy as to the title to the ore bodies, not only within the surface boundaries of the Minnie Healy claim, but also within the boundaries of the Piccolo and Gambetta claims.

The plaintiff's workings are reached through the Minnie Healy shaft. The defendant conducts its operations through the Leonard shaft.

On September 3, 1901, the defendant in that cause filed its petition therein in the district court, alleging that its only means of access to the workings made by the plaintiffs through the Minnie Healy ground was through the Minnie Healy shaft, and asking that it be allowed access to the Minnie Healy claim and the workings therein for the purpose of making an inspection and survey to obtain facts to enable it to make defense to the suit. This petition was heard on November 14th. On December 7th, after consideration by the court, the order granting the inspection and survey was made according to the prayer of the petition, and it was ordered that the defendant have access to the Minnie Healy claim and all openings therein for the space of 10 days, through its agents and representatives, not exceeding six in number, with a surveyor's assistant. The plaintiffs were required to furnish ingress and egress, and to hoist and lower the defendant's representatives into and from the premises. It was also further ordered that two representatives of the defendant be permitted to enter the Minnie Healy workings at least once each week to inspect and examine the work therein as it proceeded, until the determination of the action. On December 19, 1901, the plaintiffs in that suit filed their petition in this court asking this court to issue its order of supervisory control directed to the district court, and requiring it to set aside and vacate the order, on the ground that it was not justified by the showing made at the hearing, and that it was oppressive.

The question now before this court is whether the relators, plaintiffs in the action in the district court, are entitled to the relief sought.

It is argued on behalf of relators that the order was not justified, because the evidence adduced at the hearing showed no necessity for it. It appears that the court refused an injunction *pendente lite,* at the hearing under the order of August 17th, and that the cause stood on demurrer at the

time the order now complained of was made. It is thus manifest, counsel say, that there is yet no defined issue to try, and that the inspection order, if made at all, should have been deferred until the issues in the case should have been made up. We do not think this position tenable. The application was made under the authority of section 1314 of the Code of Civil Procedure, which allows an inspection order to be made at any time during the pendency of the action. The purpose of the section is to enable the parties to present the facts of the case to the court, so that it may intelligently adjudicate the rights involved. *State* v. *District Court,* 25 Mont. 504, 65 Pac. 1020. In order to do this it is often necessary that the parties should be in possession of the facts at an early stage of the action, so that they may be able to frame intelligently the issues to be tried. Issues properly framed are as essential to a just and fair trial of the rights of the parties as are the facts necessary to support them. The petition alleged, among other things, that the order was necessary to enable the defendant to ascertain its rights in the premises, and the court, as it should, allowed it to produce its evidence to support this allegation, evidently upon the theory that it required other facts than those already in its possession to enable it to frame its defenses. To the evidence thus adduced tending to show cause for the order, as required by the statute, must our attention be directed in order to determine whether the action of the court was proper. It must be borne in mind that the respective parties assert title to certain ore bodies, each basing its claim thereto upon an asserted ownership of the apex of a vein, or veins, to which they belong. The question to be tried in the cause is whether the apex is in the ground of the plaintiffs, or in that of the defendants in the action. In order to determine this, it will be necessary to follow the workings from the surface to where these ore bodies are situated, and to present to the court at the hearing all the

physical and geological facts from the point of view of both parties, not only as they were open to observation at the time the action was brought, but from time to time as development progresses.

The evidence tended to show that prior to the filing of the complaint the defendant in the action had free access to the Minnie Healy workings, and that it had complete maps of all the work done up to that time. After that date, however, and until the hearing, it had been excluded from the mine, while work was constantly being pushed and ore was being removed at the rate of several hundred tons per day. Access is not possible, except through the Minnie Healy shaft, and the conditions revealed by the work done from March until September were entirely unknown to it. The propriety of granting such an order in any case lies very largely in the discretion of the trial court. Under the facts presented, we cannot say that the court abused its discretion. If it had appeared that the defendant was altogether ignorant of the development work done by the owners of the Minnie Healy mine, we apprehend that no complaint would have been made of the order. It is upon this development, and the facts as they appear to them, that the plaintiffs base their claim of title to ores beneath the surface of defendant's claims. The defendant, under these circumstances, would have been entitled to the order, almost as a matter of course. The necessity to know the facts as to the development done during the time elapsing from March until September was no less urgent. That it already has part of the information obtainable under the order is no sufficient reason why the defendant is not entitled to the rest. In any event, we do not think that we should direct the district court to vacate the order entirely and postpone the examination until the issues have been made up. It may be that before that time arrives important openings will have become destroyed by caving, or filled with waste, thus rendering the inspection more difficult and expensive.

We think, however, that the order should be modified in one important particular. It appears that the owners of the Minnie Healy mine have extensive workings to the south, both within their own boundaries and beyond them-into adjacent claims. The order is extensive enough to permit an inspection and survey of all these workings also. It should have been limited to those only a knowledge of which would avail the defendant; namely, those extending easterly and westerly along the lodes, and from these north toward and into the Piccolo, Gambetta, and Dayton claims. No controversy exists between the parties as to the facts shown by the openings to the south. There is no fact in the record to warrant an order with reference to them. Inspection orders should always be limited by the necessities of the case. When they exceed this limit, they become the means of oppression. Facts might perhaps be shown justifying an order extending the survey to the whole of the Minnie Healy claim; but they do not appear in this record.

It is argued by counsel for the relators that the order should not extend to the openings into the Dayton claim. It will be observed, however, that the claim is made by the relators that the veins in controversy dip toward the north and cross both of their end lines. The defendant should be allowed to examine all the workings made in pursuit of these veins in the direction of their strike, in order to determine the continuity of their direction from east to west, as well as the angle of the dip. Observations made beyond the west end lines of the Piccolo and Gambetta might be of material assistance in determining conditions east of that point and within the sphere of the actual controversy.

It is also suggested by counsel for relators that section 1314, supra, does not authorize an inspection order in a case in which an injunction has been issued, since to permit entry by the enjoined party during the pendency of the injunction dissolves it *pro tanto* which may be done only upon motion

made for that purpose at the proper time. A sufficient answer to this suggestion is that the statute makes no distinction as to the character of relief sought in the particular action. Furthermore, upon the relators' own showing, the injunction asked for in the cause was denied. The suggestion, if of sufficient importance to demand consideration in any case, is not pertinent here.

It is not unusual in controversies of this character to permit inspections from time to time as operations progress during the pendency of the action. In this case the relators are pursuing their operations in the disputed territory. We do not think it improper for the court, under these circumstances, to permit two employees of the defendant, designated by name, to make weekly inspection of the premises under reasonable restrictions.

The inspection should be limited to the necessities of the case, as herein indicated. In other respects the order was properly made, and must therefore stand.

The writ will accordingly issue, directing the district court to modify the order so as to permit the survey and inspection of all the openings in the Minnie Healy claim along the veins in controversy, from east to west, and also all openings made by relators in pursuit thereof toward the north, whether the same be within or without the boundaries of the claim, specifically restricting the inspection to these limits.

Modified.

[1]LEMUEL DOUTHETT v. FORT PITT GAS CO.

(202 Pennsylvania 416; 51 Atl. 981. Supreme Court. April 28, 1902.)

[2]**The oil and gas well business is not one of which all persons and courts have general knowledge and is therefore specially open for the opinion of experts.**

Owner's rights to compel lessee to shoot the well. Defendant contracted to sink for oil or gas. Oil was generally found at the 100 foot sand. The contract read: "If neither gas nor oil are found in paying quantities sooner the plaintiffs shall drill well into the fourth sand." When the 100 foot sand was reached plaintiffs claimed the right to compel the defendant to shoot the well for oil at the 100 foot sand. *Held*, that he had that right and that the danger of destroying the well was not so great as to prevent allowance of such proceeding.

Appeal from Court of Common Pleas, Allegheny County.

Suit for injunction by Lemuel Douthett and others, associated together as the Thorn Hill Oil Company, against the Fort Pitt Gas Company, assignee of a contract of plaintiff company with the Rochester Tumbler Company. Decree for plaintiffs. Defendant appeals. Affirmed.

[1]The case is styled *Thorn Hill Co.* v. *Fort Pitt Co.* in the Atlantic Reporter.

[2]*Shewalter* v. *Hamilton Co.* 28 Ind. App. 312; 62 N. E. 708.

Any witness who says he knows the property and its value is competent to testify to the value of a mining prospect; the worth of this opinion to be developed by the cross-examination. *Montana Ry.* v. *Warren*, 137 U. S. 348.

A witness not an expert is not competent to say whether from an inspection of a shaft he would have known whether any work had been done in it. *Garfield Co.* v. *Hammer*, 6 Mont. 53; 8 Pac. 153.

A practical miner having experience in selling water though not familiar with the science of mensuration may testify to the carrying capacity of a ditch. *Frey* v. *Lowden*, 70 Cal. 550; 11 Pac. 838.

A witness who has seen and been familiar with only one mill is not an expert to prove rental value. *N. Y. Co.* v. *Fraser*, 130 U. S. 611.

The opinion of the court below is as follows:

STOWE, J. The plaintiffs, under the name of the Thorn Hill Oil Company, are joint owners of certain leaseholds and properties for oil and gas purposes,—one under a lease from Mary A. Douthett for forty acres, more or less, dated November 3, 1900, and another from C. Weldon for sixty acres, more or less, dated June 26, 1900. On February 25, 1901, plaintiffs entered into a written agreement with the Rochester Tumbler Company, wherein, for three thousand dollars in money and other considerations, they assigned and transferred to the tumbler company all the gas rights covered by said two leases on the farms of Douthett and Weldon, including the gas rights in the well then drilled on said Douthett farm, together with the rig and casing therein.

As a further consideration, the tumbler company agreed to drill a well on the Douthett farm, commencing within sixty days from said date, and to prosecute the same to completion with due diligence; the agreement containing the following provisions:

1. If the well produces no oil, the same to be at the cost of the tumbler company.

2. If the well produces less than ten barrels per day of oil, it was to belong to plaintiffs upon payment to the tumbler company

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One who uses machinery though not familiar with its construction is competent to testify as to its utility and condition. *Alabama Co.* v. *Pitts*, 98 Ala. 285; 13 So. 135.

Parties are not bound to agree to expert selected by the court. *State* v. *Pacific Co.* 26 S. C. 610; 2 S. E. 265.

No review of the discretion of the court below in passing upon what constitutes an expert. *New Jersey Co.* v. *Lehigh Co.* 59 N. J. L. 189; 35 Atl. 915.

Books referred to by an expert may be produced to contradict him. *Id.*

Testimony allowed to prove adequacy of appliances to control coal dust. *Harvey* v. *Susquehanna Co.* 201 Pa. 63; 50 Atl. 770.

It is peculiarly within the discretion of the trial court to allow

for the rig and casing at well values; the rig not to cost more than two hundred dollars; the drilling to be at the cost of the tumbler company.

3. If the well produces more than ten barrels per day, the plaintiffs shall pay the cost of rig and casing at well values,—rig not to exceed the cost of two hundred dollars,—and also pay the cost of drilling; and said well shall belong to plaintiffs.

4. If neither gas nor oil are found in paying quantities sooner, the defendants shall drill well into the fourth sand.

The tumbler company commenced the drilling of a well on the Douthett farm in pursuance of this agreement about May, 1900, and drilled it through what is known as the "hundred-foot sand," which appears to be the sand in which almost all the oil produced in that section of country is found. The evidence sufficiently shows that there were such indications of oil at this point as to justify the conclusion that, with proper treatment by shooting or exploding torpedoes at this point, oil might be found in paying quantity. The plaintiffs demanded the right to "shoot" the well, before defendants

experienced miners to testify to conclusions in the nature of expert evidence, on a showing of competency satisfactory to it. *Czarecki* v. *Seattle Co.* 30 Wash 288; 70 Pac. 750.

An expert who testifies what timbers are necessary to make a roof safe, may also testify what was the cause of the accident. *Donk Co.* v. *Stroff*, 200 Ill. 483; 66 N. E. 29.

The opinion of miners as to how much dirt could be treated in one day on a placer claim was properly excluded when not shown to be familiar with the ground and the questions not confined to any particular condition of the ground. *Walton* v. *Wild Goose Co.* 22 M. R. —.

Whether a crevice is of such value as to justify a prudent miner to follow is a proper subject for expert testimony and experts may express opinions although such opinions are on the same points which the jury must ultimately find. *Wilson* v. *Harnette*, 32 Colo. 172; 75 Pac. 395.

Whether the employer used a safe mode of lowering rails down a shaft is a jury question and expert opinions on the safest methods are not admissible. *Johnson* v. *U. P. Coal Co.* 28 Utah 46; 76 Pac. 1089.

should drill further, for the purpose of determining whether oil could be obtained in this sand, which defendants refused to allow; and thereupon plaintiffs filed this bill, and obtained an injunction preventing the defendants from further drilling the well until plaintiffs had been allowed to fairly test said well, or to have it tested for oil, in said sand. No test has yet been made, and the drilling has been stopped; and there the matter stands to this day, when the case comes up for determination on final hearing as to whether defendants shall be allowed to proceed with drilling the well before the plaintiffs shall be allowed to test it in this hundred-foot sand for oil by shooting or torpedoing it in this sand.

The evidence satisfies us that the general understanding of oil men in this district at the time this agreement was entered into was that oil was nearly always found in this hundred-foot sand, if found at all, and that if it was not found there it was not likely to be found at all. It is clear the well could not be operated as both an oil and a gas well. It must be one or the other, and therefore we think the contract should be construed in view of that fact, and that plaintiffs should have the right, when the indications fairly promised oil, and the reasonable probability was it would be found in paying quantity, to have the well tested in the proper and usual manner, by shooting, unless it is made to appear from testimony that such treatment would seriously jeopardize the further drilling of the well in case oil was not found, and it was necessary to drill to the fourth sand.

How, then, does the evidence stand upon this question?

We must here note that defendants do not deny the right of plaintiffs to test the well at some time, but claim that they should not do so until the drilling has gone to the fourth sand, or at least below where it has now been drilled, alleging that such test was dangerous to the further drilling of the well, and, if not productive of sufficient oil to pay, would stop its further development by destroying it, and thus prevent

them having the benefit of their agreement, and also aver that, in such cases as this, that is not only the safer course, but is the one usually adopted under similar circumstances. Considerable testimony has been given to show that persons contracting to drill wells will not allow shooting tests as they drill, unless specially provided for in their agreement, but we have no evidence at all in regard to such a case as this. So far as the evidence tends to show the danger to the well by shooting, it is well enough, but it fails to throw any light upon the proper construction of this particular agreement in any other respect. While the evidence satisfies me that there is some danger in shooting a well in the situation this one is in, if not carefully and properly done, it appears to me to be the usual course, and that the danger is not so great as to justify us in saying that it was not intended to be allowed under this agreement. Taking it all together, we think the fair interpretation of this agreement is that plaintiffs have the right to secure oil in this hundred-foot sand if it can be done by shooting, that such is the usual course under similar circumstances for testing a well for oil, and that the danger to the further drilling of the well by such shooting is not such as should prevent its now being tested by plaintiffs before further drilling is done by defendants, and therefore are of opinion that plaintiffs are entitled to the relief prayed for. We further think that the findings of facts requested by plaintiffs are correct, as also the conclusions of law arising therefrom, and therefore affirm the same; and the prothonotary is now directed to enter a decree sec. reg. in accordance with this opinion.

WILLIAM H. MCCLUNG, EDWIN S. CRAIG, and RALPH LONGENECKER, for appellant.

W. H. S. THOMSON, and JOHN W. THOMAS, for appellee.

PER CURIAM. This is by no means a one-sided case. Its decision rests on the interpretation of the written agreement of the 25th of February, 1901. As an aid to such interpretation, the court heard oral evidence of experts and practical producers of oil and gas in the oil and gas belts, not to change, modify, or contradict the writing, but merely as explanatory thereof,—in other words, to show the surroundings of the parties at the time their minds were brought to assent to the same thing. This kind of evidence is always admissible in the interpretation of such writings. The subject of it is not well known to any but those engaged in the particular business which gives rise to the contract. Many phases of that business are so familiar to the parties that knowledge of them is assumed on the part of all others as well as by courts, hence what is implied in the minds of the contracting parties is often not expressed in the writing, and hence, also, the admissibility of oral evidence. The learned judge of the court below, in his opinion, says:

"The evidence satisfies us that the general understanding of oil men in this district at the time this agreement was entered into was that oil was nearly always found in this hundred-foot sand, if found at all, and, if it was not found there, it was not likely to be found at all. It is clear the well could not be operated as both an oil and a gas well. It must be one or the other, and therefore we think the contract should be construed in view of that fact, and that the plaintiffs should have the right, when the indications fairly promised oil, and the reasonable probability was it would be found in paying quantity, to have the well tested in the proper and usual manner, by shooting, unless it is made to appear from testimony that such treatment would seriously jeopardize the further drilling of the well in case oil was not found, and it was necessary to drill to the fourth sand."

He then, in his conclusion, says: "Taking it all together, we think the fair interpretation of this agreement is that

plaintiffs have a right to secure oil in this hundred-foot sand if it can be done by shooting, that such is the course under similar circumstances for testing a well for oil, and that the danger to the further drilling of the well by shooting is not such as should now prevent its being tested by plaintiffs before further drilling by defendant."

There was evidence on the part of the defendant that, under the circumstances, to shoot the well at the present depth might destroy it, which would be greatly to its loss, and therefore ought not to be implied as a right under the contract. This view has been very ably and plausibly argued by counsel for appellant; but, in an evenly balanced case like this, the opinion of the trial judge, who had before him the witnesses, is very persuasive with us, and we therefore adopt his opinion.

The decree is affirmed.

STATE EX REL GEYMAN v. DISTRICT COURT ET AL.

(26 Montana 433; 68 Pac. 797. Supreme Court. April 29, 1902.)

Petitioner having no interest. The law allowing of inspection of mining claims has no application and inspection will not be allowed where petitioner asserts no interest in the property of which inspection is sought or through which entry is necessary to inspect adjoining property.

Certiorari by the State, on the relation of Charles Geyman, against the District Court of the Second Judicial District of Montana and Hon. E. W. Harney, judge thereof, to review an order made by the court. Order annulled.

McBRIDE & McBRIDE, for relator.

FORBIS & MATTISON, McHATTON & COTTER, and JOHN LINDSAY, for respondents.

BRANTLY, C. J. Application for writ of *certiorari* to have reviewed and annulled an order made by the district court of Silver Bow county on April 18, 1902, permitting one Hubert to enter certain of the underground workings of the Yankee Boy lode claim, belonging to the relator herein, and to make inspection and survey thereof. Hubert in his petition filed in the district court, alleged ownership of adjoining property, but claimed no interest in the Yankee Boy premises. The purpose sought by the survey was to discover whether relator had entered, by means of his underground workings, beneath the surface of Hubert's property and removed ore therefrom. No suit was pending between the parties. The order was made upon the theory that the court was

The order should be limited to those openings which avail in the present controversy. *State* v. *Dist. Court*, 22 M. R. 195.

authorized to grant it under section 1317 of the Code of Civil Procedure. This section was construed in *State* v. *District Court,* 26 Mont. 396; 68 Pac. 570, and in *State* v. *District Court,* 26 Mont. 412; 68 Pac. 1134, decided at the present term. It was there held that this section had no application to a case in which the petitioner asserts no interest in the property of which inspection is sought, or through which entry is necessary to inspect adjoining property. Under authority of those cases, the order under consideration was without jurisdiction, and must be annulled. It is so ordered.

UNION GOLD MINING CO. v. WILLIAM D. CRAWFORD.

(29 Colorado 511; 69 Pac. 600. Supreme Court. May 5, 1902.)

Company knows its own employees. Defendant company, in an action for injuries to a servant caused by the negligence of a person in its mine, cannot require plaintiff to make the complaint more specific by stating whether such person was an employee of defendant, as it has knowledge of such fact.

The courts reading from the pleadings in its charge is not erroneous if the issues raised are correctly stated.

An instruction, in a personal injury case, that the verdict must be for plaintiff if his injuries were occasioned by defendant's negligence, is not erroneous in using the word "occasioned" instead of "caused."

"Likely" to prove permanent. An instruction that, in estimating damages, the jury should consider the nature of the injuries suffered, as to whether they are "likely" to prove permanent, or temporary only, is not erroneous in using the word "likely," as authorizing conjectures in determining the nature of the injuries.

Servant of lessor not fellow to servant of lessee. A servant of a mining company, working at the bottom of a shaft which is operated by the company to hoist ore from the various levels of the mine for lessees of the levels, and an employee of a lessee allowing ore to fall and injure the former, are not fellow servants.

[1]**In bad condition when leased.** Where a level in a mine is in the same negligent condition when leased by the owner as at the time of a subsequent injury of an employee of the owner, in a shaft operated

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[1]*Parties.*

The owner is not liable for an accident occuring under a contractor. *Lendberg* v. *Brotherton Co.* 75 Mich. 84; 42 N. W. 675.

Reserving the right to supervise the contractor's work does not make owner liable for an accident happening while the shaft was being sunk by the contractor. *Welsh* v. *Lehigh Co.* (Pa) 5 Atl. 48.

Lessor of the coal not liable for injuries to the surface owner by the negligent work of the lessee of the coal. *Hill* v. *Pardee,* 143 Pa. 98; 22 Atl. 815.

Construction of the Illinois Act as to who are proper parties to sue under statutory actions in favor of certain heirs of deceased. *Willis Co.* v. *Grizzell,* 198 Ill. 313; 65 N. E. 74.

That plaintiff is a stockholder in defendant company does not bar his suit against the company for negligence. *Morbach* v. *Home M. Co.* 53 Kans. 731; 37 Pac. 122.

by him, resulting from such condition, the owner is responsible therefor.

No barrier at foot of incline level. The construction, in an upper level of a mine, of an ore tramway on such a grade that cars started thereon, or starting by gravity, will run into the shaft by their own momentum, without providing sufficient barriers to prevent their falling down the shaft, is negligence.

[2]**Proximate cause.** A mine owner leased a level having an ore tramway running to a shaft, constructed so that a car would run into the shaft, which was operated by the owner for the benefit of the lessees; and an employee of the lessee, without being guilty of negligence, allowed a car to run into the shaft and injure an employee of the owner. *Held*, that the negligent construction of the tramway without barriers was the proximate cause of the injury.

[3]**Measure of damages. Loss of foot.** Where the evidence in a personal injury case shows that defendant's injuries compelled the amputation of a foot, and that he lost the use of a finger, and had his skull fractured, and was unable to work, a verdict for $15,000 is not excessive.

Appeal from the District Court of El Paso County.

MESSRS. WOLCOTT, VAILE & WATERMAN, and MR. WM. M. FIELD, for appellant.

MR. JOHN K. VANATTA, for appellee.

MR. JUSTICE STEELE delivered the opinion of the court.

The injuries to the appellee occurred on the 18th of September, 1898, while he was working at the bottom of the shaft

[2]For cases on proximate cause. See *Deserant* v. *Cerillos Co.* 20 M. R. 573. *Asbestos Co.* v. *Durand*, 20 M. R. 452 and notes.

[3]*Measure of Damages.*

Verdict for $4,000 for two fingers: Plaintiff compelled to cut down to $3,000. *Mahood* v. *Pleasant Valley Co.* 8 Utah 85; 30 Pac. 149.

Proper basis of estimate of damages where suit is brought by heir for death by negligence stated. *Colorado Co.* v. *Lamb*, 6 Colo. App. 255; 40 Pac. 251. *Coffeyville Co.* v. *Carter*, 65 Kans. 565; 70 Pac. 635.

of the Orpha May mine, the property of the appellant. The appellee is a miner, and was employed by the appellant. A car loaded with ore, in charge of an employee of a lessee of the fourth level of the mine, fell from the fourth level to the bottom of the shaft, a distance of about seven hundred feet. A heavy canopy had been built over the place where they were working, for the protection of the miners. The momentum of the falling car and ore was so great that the canopy was broken, two of the miners were killed and the appellee was seriously injured. In the complaint the injuries sustained by the appellee are described as follows: "That at the time the car fell into the bottom of said shaft, as aforesaid, it struck the plaintiff so as that his right leg was crushed in such manner as that it was necessary to amputate the same; that the plaintiff's left hand was injured so as that two of the fingers on said hand were, and are, rendered useless to this plaintiff, and he was injured in and about the head in such a manner as that his skull was fractured."

The levels of the mine were worked by lessees under separate leases. The company was engaged at the time in question in sinking the shaft. By an agreement with the lessees, the company was to take ore at the mouth of the level and hoist it to the surface, and to do this the levels were so arranged that the ore cars could run into the hoisting cage. The entrance to level No. 4 was protected by an iron chain, one

Remittitur compelled in action for negligent death from $10,000 to $6,000. *Vowell* v. *Issaquah Co.* 31 Wash. 103; 71 Pac. 725.

Where defendant took risk of employees life in preference to outlay for supports obviously needed, verdict for $10,000 value of defendant's life was upheld. *Bertha Co.* v. *Black*, 88 Va. 303; 13 S. E. 452.

Plaintiff was crippled for life. Defendant's superintendent gave him a written promise to pay him $1.25 per day during disability. *Held:* That such superintendent had power to make such contract and that "during disability" did not mean merely the time that a nurse and a doctor were required. *Am. Q. Co.* v. *Lay*, — Ind. App. —, 73 N. E. 608.

end of which was fastened to the timbers of one side of the level, a hook was fastened to the other side and so arranged that a link of the chain could be thrown over the hook, thus closing the entrance. The purpose of this chain barrier, say counsel in their brief, was to protect the men from carelessly or inadvertently stepping into the shaft as they were working in the level near it. Henry Funk, an employee of the lessee of the fourth level in question, was engaged in tramming ore from a stope in the level to the shaft. Funk testified: "I was tramming there at the time this accident happened. I had filled the car and was standing between the car and a pile of ore and was shoveling up around the plat preparatory to filling up the next car, and when I turned to take the car away it was already gone. I started after the car, but my candle went out, and I followed on the best I could, and in a few seconds the car struck at the shaft. * * * The car was supposed to be a two thousand pound car and it was full. The car started of its own accord; it was gone before I was aware of it. When it started it was a hundred or a hundred and fifty feet from the shaft. Nobody told me the grade of this track. I could perceive there was a grade there by going over it; I knew it was there."

The witness Leffingwell, a civil and mining engineer, testified that he had made measurements in the level after the accident. He said: "The level falls toward the shaft to the amount of two feet and one-half in its length, which is one hundred and twelve and a half feet from the shaft. From a point five feet from the face to a point twenty-five feet from the face, a distance of twenty feet, the track falls nine inches in elevation, that is, there is a fall of nine inches in twenty feet. A loaded car will not start of its own accord on a grade which is only six or eight inches to a hundred feet; it would gradually decrease in speed and stop."

Herbert Starkweather, a witness for the defendant, testified: "I was employed by the Union Gold Mining Company

as superintendent of the Orpha May mine and other properties. Clements took possession of a portion of the level a short time before the accident. The company operated it during the month of February and, I think, before that time. There had been no change in the condition during the time I was in charge of it. I took charge of the property the 1st of February. There were no changes made by him in the level (the lessee, Clements, in the 4th level). He was working above that level; he had nothing to do below. He took the ore out through the level, and the level was in the same condition, as far as I know, when it was leased to him by the company. After the accident I took a man down to the fourth level of the Orpha May mine. I wished to ascertain how the car got away from the man. I took the car down and had him load the car, and ran it both ways several times over the track. It was with some difficulty we started the loaded car at the immediate point where we loaded it but after it was started it ran readily down there to the mouth, but there was no trouble at all for a man to control the running of the car. The track was not straight; it followed the vein, and there were short crooks and curves in the track. I did not block the car because I wanted to see if it would start or not with the jarring of the car. I never learned of any difficulty in operating loaded cars upon this track. There was quite a raise, as the surveyor testifies, at this one point, and beyond that it was level or nearly so, possibly a slight decline, for a long distance. The level is not constructed at any excessive grade. This one particular point the grade, as the surveyor testifies, was steeper than at any other point."

"Q. Was steeper than you find in a great many places? A. Steeper than usual, but there was no difficulty to a man running a car over it with any ordinary precaution."

"We started a loaded car and an empty one. The empty car would not go to the shaft but the loaded car did. It did not run very fast, but it ran enough to go over the grade into

the shaft if we had allowed it; we stopped it before it got to the shaft. The loaded car ran about as fast as a man would ordinarily walk."

During the course of the trial testimony was received over the objection of the defendant, and exceptions were saved, but we regard the errors, if any, as unimportant and not prejudical, and they will not be considered.

A motion was interposed by the defendant to have the complaint made more specific. The motion was granted in part, and the defendant alleges error in the court in not requiring the complaint to be made specific in every particular designated by the defendant. By this motion the defendant sought to have the plaintiff allege whether the person who had charge of the car in the fourth level was a servant or employee of the defendant. It was not error to deny this motion; the defendant knew whether Funk was an agent or employee of the defendant, and we think it is not material in this case inasmuch as it was shown upon the trial that the person in charge of the car was an employee of a lessee of the fourth level.

The trial resulted in a verdict for the plaintiff in the sum of fifteen thousand dollars. The defendant appealed to this court.

The principal errors alleged and discussed are the refusal of the court to give certain instructions offered by the defendant and the giving of certain instructions over the objection of the defendant.

Request No. 1 is an instruction concerning the preponderance of the evidence and was fairly covered by instruction No. 8 given.

Request No. 2 contains a definition of negligence. The court, in another instruction, gave a definition of negligence approved by leading authorities.

Request No. 4 is in reference to an intervening cause, and, we think, is not applicable to this case.

Requests Nos. 7 and 8 were given in substance in instruction No. 9.

Request No. 11 directs the jury to disregard the testimony of the

witness Leffingwell because it was stricken. The testimony was not stricken.

Requests Nos. 11 and 12 charge that the defendant was not guilty of negligence, and were properly refused.

Request No. 14 states that the company is not responsible for the negligence of Funk, the person who had charge of the car; and this, in substance, was given by the court.

Request No. 15 was to the effect that the defendant did not construct the track in the level, and that it knew nothing of its condition at the time plaintiff was injured. This instruction was properly refused.

No. 16 is an instruction in effect that the defendant is not guilty of negligence, and was properly refused.

No. 17 was a request for the jury to return a verdict for the defendant; and this was properly refused.

In instruction No. 1 given, the court read to the jury certain allegations of the complaint and answer concerning the disaster, and the defendant objected to the court's thus reading from the pleadings but we think the court correctly stated the issues raised, and that no error was thus committed.

If the case was to be submitted to the jury, instruction No. 2 was properly given. It is objected that the court in instruction No. 2 failed to carefully explain the meaning of the word "proximate," but we think the jury was not misled by the giving of this instruction.

In instruction No. 4 the court gave the jury a definition of negligence. Counsel object that this is an incorrect definition of negligence, and was improperly given. This is the definition of negligence adopted by Judge Cooley, and is quoted with approval by text-writers; and while it may not be in every particular absolutely correct, we are not disposed to question it and do not think the court erred in giving it.

No. 5 is objected to because the judge directed the jury to find for the plaintiff if it should find that the injuries were occasioned by the negligence of the defendant, and it is insisted that by the use of the word *occasioned* instead of the word *caused,* "the jury were left without warning, guidance,

or limitation in fixing liability for appellee's injury." The judge undoubtedly used the word "occasioned" as the synonym of "caused," and we are satisfied that the jurors were not thereby misled. It is also urged that this instruction should have included the question of assumption of risk, but the court properly instructed the jury upon this question in instruction No. 10.

In instruction No. 6 the jury was told that in estimating the plaintiff's damages it "should also consider the nature of the injuries suffered as to whether they are likely to prove permanent, or temporary only. The following appears in the bill of exceptions: "The defendant objected to the giving of instruction No. 6 of the instructions given by the court to the jury, and especially objected to the giving of that portion thereof as follows: 'as to whether they are likely to prove permanent, or temporary only;' and before said instruction was given to the jury the defendant objected to the use of the word 'likely' in connection with the words 'to prove permanent, or temporary only.'" Although much space is devoted to a discussion of questions raised here for the first time, we shall consider only the objection called to the attention of the trial court. It is insisted that by the use of the word "likely" "the jury are permitted and encouraged to indulge in conjecture and speculation in determining the extent of appellee's injuries, that the law forbids this and requires that their finding as to the future or continuing consequences shall be confined to such only as the evidence shows to be reasonably certain to result." We do not think the jury was encouraged to indulge in conjecture by this instruction. It was told in assessing damages, to consider the nature of the injuries as to whether they were likely to prove permanent, or temporary only. The definition of "likely" given by the Standard dictionary is "in all probability." There is always more or less conjecture as to whether injuries are permanent or temporary, and the determination of the

question is usually based upon opinion testimony; and while we cannot recommend "likely" or "in all probability" as interchangeable or synonymous with the words "reasonably certain," the difference is but slight, and we do not feel warranted in reversing the case because of the failure to use the words "reasonably certain" in this instruction. Moreover, the plaintiff's injuries consisted mainly in the loss of his leg. This is a permanent injury. And having seen the condition of the plaintiff, the jury did not indulge in speculation as to the permanent injury of the leg.

The appellant contends: 1. That there was no negligence on the part of the defendant. 2. That the conditions existing in the fourth level were not the proximate cause of the appellee's injury. 3. That the negligence, if any, which caused appellee's injury was the negligence of an independent contractor. 4. That the injuries were caused by the negligence of a fellow servant of the appellee. 5. That the appellee knew the condition of the fourth level when he accepted employment from appellant, and that he assumed the risk of any injury which he might suffer resulting from the known condition.

The determination of these questions will dispose of all other objections to instructions.

In reference to the fourth and fifth it is sufficient to say that the injuries were not caused by the negligence of a fellow servant, and that the appellee did not know the condition of the fourth level, or, rather, that there was no testimony to show that the appellee knew of the condition of the fourth level.

The law required the company to provide for its employees a reasonably safe place in which to perform their work.

The testimony is silent as to who constructed the tram in the level or who erected the barrier at its mouth. The testimony shows, however, that the level when turned over by the company to the lessee was in the same condition in which it

was on the day of the accident. The company, therefore, is responsible for the condition of the level. The testimony of the witness Leffingwell as to the grade of the track in the level is not disputed, in fact defendant's witness corroborates him in saying that the grade was unusual in some places. According to Leffingwell's testimony, the distance from the point where the ore was loaded on the car to the shaft is about one hundred twelve and one-half feet. The level falls toward the shaft to the amount of two and one-half feet in its length. The grade is greater in some places than in others. "From a point five feet from the face, to a point twenty-five feet from the face, the track falls nine inches in elevation." The experiments made by the defendant's witnesses demonstrated that a loaded car, if started would run into the shaft. The witness Funk testified that the car which was precipitated into the shaft was not started or pushed by him. The facts are that whether the loaded car was started by human agency or by the force of gravity, it started, and, there being no barrier of sufficient strength to stop it, the car and contents were thrown into the shaft and fell to the bottom, killing two of appellant's employees and seriously injuring the appellee. We are of opinion that the company, in maintaining a track with the excessive grade which is shown to have existed in this level and in not providing a barrier of sufficient strength to resist the force of a loaded car of ore running upon the track, was guilty of culpable negligence. The act of maintaining a track with the excessive grade would not alone render the company liable for the injury in this case. A runaway car could be stopped by a sufficiently strong barrier at the mouth of the level. The barrier provided was not for the purpose of preventing a car from running into the shaft, but to prevent the workmen from walking into it. The most ordinary foresight and prudence, it would seem to us, would have dictated some suitable protection at the mouth of the level. The most cautious man might lose control of a loaded car in a level

such as the fourth level of this mine, and there was a breach of the positive duty of the company in not guarding against such an occurrence.

But counsel contend, assuming the company to have been negligent, that the conditions existing in the fourth level were not the proximate cause of appellee's injuries and that the negligence which caused appellee's injuries was that of an independent contractor. We shall consider these as one proposition. Wharton, at section 134 of his work on Negligence, says: "I am negligent on a particular subject matter. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces." This section from Wharton is quoted by counsel in their brief as sustaining the position that an independent contractor had caused the accident, and that the company, for this reason, was not liable. Accepting this as a correct statement of the law, it cannot be applied to the facts in this case. The facts are that this company was engaged in sinking a shaft on its Orpha May mine; that it employed the plaintiff to work in the bottom of the shaft; that it had leased the fourth level of its mine, about seven hundred feet above the place where the plaintiff was working, with the track as therein constructed; that the company, as part of the conditions of the lease was to hoist the ore from the mouth of this level to the surface; that the track in the level was laid upon an excessive grade; that no barrier was erected at the mouth of the level to prevent the cars from running into the shaft; that a loaded car weighing nearly a ton fell down the shaft and upon the appellee; that as found, by the jury, the employee of the lessee could not, by the exercise of ordinary care, have managed the car with safety to the company's employees; that the car escaped from the em-

ployee of the lessee, and that he was unable to prevent its escape by the exercise of ordinary care. Here the causal connection was not broken.

There was no interposition of independent responsible human agency. No third person, moving independently, came in, and either negligently or maliciously so acted as to make the negligence of the company injurious; but the injury was the natural consequence of the wrongful act of the company, and "was such as might or ought to have been foreseen, in the light of the attending circumstances."

Mr. Justice Strong, in *Milwaukee, etc., Co.* v. *Kellogg*, 94 U. S. 469, has this to say: "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place. 2 W. Bl. Rep. 892. The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

This court, in *Colorado Co.* v. *Rees*, 21 Colo. 445, quotes

with approval the following: "Negligence may, however, be the proximate cause of an injury of which it is not the sole or immediate cause. If the defendant's negligence concurred with some other event (other than the plaintiff's fault) to produce the plaintiff's injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible, even though his negligent act was not the nearest cause in the order of time." And the following: "The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise." In the case cited, the defendant was the owner and had full control of an elevator operated for the use of its tenants and patrons. A trespasser opened the door of the elevator cage and left it standing open. The elevator car was at the top of the building, the open door on the ground floor. The plaintiff, believing the car was at the ground floor, walked through the door and fell to the basement. The court said: "It was the duty of the defendant, in operating the elevator in question, to exercise the utmost care and diligence, and to provide and maintain proper and secure fastenings to the doors opening into the elevator way that could not be opened or controlled from the outside. Therefore the court was correct in saying that it was 'wholly immaterial whether such door was opened by some third person or not, provided that such accident could not have happened but for the negligence of the defendant in keeping and maintaining the fastenings to its elevator door;' for, had it performed its duty in the premises, such interference by a third person would have

been impossible; hence its negligence necessarily concurred in, and constituted an essential factor in, causing the injury. It is well settled by the adjudged cases where an injury is the result of the combined negligence of the defendant and the negligent or wrongful act of a third person, for whose act neither the plaintiff nor the defendant is responsible, the defendant is liable, when the injury would not have happened except for his negligence."

Guided by these authorities, we can arrive at no other conclusion than that the proximate and efficient cause of the injury was the negligence of the defendant, and that it should be held liable to the plaintiff for the damages shown to have been sustained.

It is urged that the verdict is excessive. Counsel say that fifteen thousand dollars loaned at eight per cent interest will yield the plaintiff an income in excess of the amount he has ever earned or is able to earn, without touching the principal. This without the slightest physical or mental exertion. This company, by its culpable and wanton negligence, has made a physical wreck of its employee, and it would now enforce this cruel rule against him by showing that the amount of the verdict at interest will yield him more than he could earn if he were in perfect physical condition. But if his damages were measured by this unjust rule, the verdict is not excessive. In the first place he can not, "without making the slightest mental or physical exertion," cause his capital to yield eight per cent interest. After the payment of expenses and taxes, he will do well if he receives a net income of four per cent on his money—but little more than half of the amount he could earn before the injury. So that, eliminating entirely the question of damages for the loss of his leg, the damages for the fracture of his skull, the amount of the verdict, if placed at interest, will return to him barely sufficient to live upon. The record does not disclose the exact nature of appellee's injuries. The complaint alleges that

the leg was amputated; the testimony of the plaintiff in the bill of exceptions is that the foot was amputated. During the oral argument the attention of counsel for appellee was directed to these apparently conflicting statements, and he asserted that the complaint correctly set forth the extent of the injuries, and that the leg was amputated above the knee. But whether the leg was amputated above or below the knee, the jury saw the physical condition of the plaintiff, and, being properly instructed awarded him the damages. "The law does not warrant us in disturbing the verdict where no important error has occurred on the trial, unless the amount of damages allowed is so manifestly disproportionate to the injury received as to make it apparent that the jury were influenced by some prejudice, misapprehension, or by some corrupt or improper consideration." *Wall* v. *Livesay,* 6 Colo. 474.

For the reasons given the judgment is affirmed.

Affirmed.

On Petition for Rehearing.

PER CURIAM. In the petition for rehearing, counsel charge that we have determined "the nature and extent of appellee's permanent injury from matters *de hors* the record, and inconsistent with and, to a certain extent, contradictory to the evidence preserved in the record."

Counsel are mistaken. At the trial, the plaintiff testified: "My condition was, that I had one foot crushed in such a way that it had to be amputated; I had thirteen cuts on my head, and my skull was fractured four inches, here. I have lost the use of that finger, and there is a cut across my knee that there was fifteen stitches taken in. * * * My limb, from some unknown cause, gets very sore, and I cannot work on it; in fact, I am not able to work, anyhow. When trying to rise

suddenly, or turn around, I become dizzy, and have to get hold of something to stand up; otherwise I would fall over, and I have fallen over several times." It was from this testimony that we determined the nature and extent of plaintiff's injuries, and not from the allegations of the complainant and the statements of counsel. We do not regard a verdict for $15,000 as damages for injuries such as the plaintiff by his testimony is shown to have sustained, so excessive as to warrant the presumption that it was the result of oppression or prejudice.

In the opinion it is stated that, "the plaintiff's injuries consisted mainly in the loss of his leg." This is, perhaps, an inaccurate description of the plaintiff's injury, but our judgment that the verdict was not excessive was based upon the testimony of the plaintiff.

The petition for rehearing is denied.

MARTHA G. LASIER ET AL. v. THE APPLETON LAND & IRON CO. ET AL.

(130 Michigan 588; 90 N. W. 322. Supreme Court. May 19, 1902.)

[1]**Royalty reduced on false representation of lessee.** The lessee of an iron mine under a lease by which it was agreed to pay a royalty of six cents per ton did not succeed, and while negotiating a sale of its plant represented to the lessors that the sale could not be made and mine operated unless the royalty was reduced to four cents. Relying upon such representations, the lessors agreed to make such reduction. Thereupon the lessee completed the sale and contracted with the purchaser that he should pay to it the royalty of six cents, as provided in the lease. On discovering the falsity of such representations, the lessors filed a bill against the lessee and purchaser to cancel such agreement to reduce the royalty on the ground that it was fraudulently obtained, and for an accounting for the two cents per ton for the ore mined. *Held*, that complainants were entitled to the relief prayed as against the original lessee.

A corporation must respond for the fraudulent representations of its president when making contracts on its behalf.

Appeal from Circuit Court, Dickinson County, in chancery; JOHN W. STONE, Judge.

[1]Collusion with lessee to forfeit and renew. *Wood* v. *Londonderry*, 6 M. R. 464.

Lessee was to have a refusal. When he requested lease, was informed $20,000 had been offered. In fact only $10,000 had been offered. *Held*, that he could recover $10,000 without regard to the value of the lease. *Guffey* v. *Clever*, 146 Pa. 548; 23 Atl. 161.

Damages against company for inducing tenant to quit on false statement that the mine was sold. *Ober* v. *Schenck*, 21 M. R. 460.

Secret payment by vendor to one of the purchasers: *Held*, breach of trust, though the mine worth the full price. *Beck* v. *Kantorowicz*, 6 M. R. 480.

Associates in fraud liable for each others receipts. *Getty* v. *Devlin*, 7 M. R. 119.

See notes to *Hanley* v. *Sweeny*, 21 M. R. 333 and *Sun Dance Co.* v. *Frost*, 21 M. R. 252.

Action by Martha G. Lasier and others against the Appleton Land & Iron Company and others. From a judgment for defendants, plaintiffs appeal. *Reversed.*

WALKER & SPALDING, for appellants.

JOHN O'HARA (BALL & BALL, of counsel), for appellees.

HOOKER, C. J. The complainants were owners in fee as tenants in common with the Appleton Land & Iron Company, one of the defendants, of the land described in their bill, and executed to said company a mining lease of their interest, whereby the company was authorized to mine iron upon the premises on a royalty of six cents a ton. The company made a large investment, but the enterprise was not successful, and it began negotiations with the Illinois Steel Company with a view to selling its plant and turning over to it the right to conduct mining operations upon the lands. At this time Mr. Hyde, the president of the Appleton Company, sought and obtained from these complainants a reduction of the royalty to four cents. This was evidenced by writings signed by the respective complainants and forwarded to him. He was unable to conclude a deal with the Illinois Steel Company, but subsequently made an arrangement with the American Mining Company, whereby the Appleton Company sold its plant to said company, which succeeded to the lessee's interest in a portion of the leased property through assignments. This company was to pay a royalty at the rate of six cents a ton. It began operations, and made its first payment of royalty by sending checks to the complainants at the rate of six cents. Afterwards it wrote them that it had been laboring under a misapprehension in regard to the royalty, and asked the return of the extra two cents a ton over and above the four cents which they had agreed with Hyde to accept. Soon after, this bill was filed for an account between the several parties, and

to set aside the several writings by which the complainants agreed to accept four cents a ton, and to require payment to them at the rate of two cents a ton for all iron theretofore mined, and for a decree that the American Mining Company should thereafter make payments of royalty at the rate of six cents a ton to them. The bill alleged that the Appleton Land & Iron Company, through its agent, Hyde, had fraudulently induced the complainants to make such agreements reducing the rate of royalty by the representation that he could not dispose of the lease at a royalty of six cents. The proofs show that after the execution of the first writings, whereby the royalty was to be reduced, Mr. Hyde called upon the complainants, and requested them to make a second writing, upon the representation that the first writing had not been acknowledged, which was necessary. These writings were conditioned upon a prospective arrangement with the Illinois Steel Company, the Cundy Mining Company, and the American Steel & Wire Company, or their successors or assigns. Upon the hearing the bill was dismissed.

We find the case to be one largely of fact, and from the evidence we are satisfied that the complainants were induced to sign these writings upon the representation that it was necessary to the consummation of any arrangement whereby the mines could be worked, and with the understanding and expectation that the royalties to be paid thereafter by the prospective successor of the Appleton Company would be four cents, and not six cents. It appears that Hyde succeeded in obtaining a royalty of six cents, and that his company received a profit of two cents a ton. We find nothing in the case to indicate that he ever offered an assignment of his lease at less than six cents, but whether he did or not, we think his contract was fraudulent as to these complainants, and that they should be entitled to receive from the Appleton Company their proportionate share of the amount heretofore received by it, and that hereafter the American Mining Com-

pany should be required to pay its proportionate share of the royalties paid by it to the complainants.

We consider it unnecessary to discuss at length the legal questions raised by the defendants' counsel. We think the Appleton Company is bound to respond for the fraud of its president, Mr. Hyde, who acted as its agent in the transaction; that it cannot escape its responsibility upon the ground that the contract between itself and the American Mining Company cannot be rescinded; and we see no difficulty in requiring the American Mining Company to pay the royalty which it has agreed to pay to the persons who are justly entitled to it.

The decree of the circuit court is reversed, and a decree will be entered here in conformity to the prayer of the complainants' bill and the cause remanded for such further proceedings as shall be necessary to determine the state of the account between the parties, and for the enforcement of the decree. The complainants will recover costs of both courts.

LONG, J., did not sit. The other justices concurred.

PHELPS v. CHURCH OF OUR LADY, HELP OF CHRISTIANS.

(115 Federal 882. Circuit Court of Appeals. Third Circuit. May 22, 1902.)

[1]**Marble is a mineral.** Under the law of New York as settled by its court of appeals, marble in place is a "mineral," and the title thereto does not pass by a conveyance of the land which excepts and reserves to the grantor all mines and minerals which may be found therein.

Defense of title in third person. In a jurisdiction where the rule prevails that a defendant in trover may defeat recovery by showing the ownership and right of possession of the property sued for in a third person, the same defense is available where the plaintiff elects to waive the tort and sue in assumpsit to recover the value of the property.

Lease subject to reserves of lessor's deed. Where a deed of land reserves the minerals and a lease from the party holding under such deed is made subject to the exceptions in lessor's original deed the lessee takes no title to the minerals and such deed will not support assumpsit by the lessee to recover the value of such minerals removed by a third party.

In Error to the Circuit Court of the United States for the District of New Jersey.

ROBERT H. MCCARTER, for plaintiff in error.

DAVID H. MCCLURE, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. The case presented to us upon the former writ of error was that of an action brought by the

[1] *Hext* v. *Gill*, 17 M. R. 1. *Gt. Western Ry.* v. *Blades*, 21 M. R. 425. A deed of mineral ores does not include granite; deed construed to include only minerals obtained by underground work. *Armstrong* v. *Lake Champlain Co.* 18 M. R. 279.

receiver of a company which had the right of property in the marble contained in a tract of land in the state of New York to recover the value of marble quarried from the land by a mere trespasser, who acted for and delivered the marble to the defendant. This statement is fully borne out by the opinion of the court. 40 C. C. A. 72, 99 Fed. 683. Speaking of the indenture made November 25, 1892, between Mrs. Mary Brady, the party of the first part, and James W. Carpenter, Jr., and James A. Phelps, the parties of the second part, the court said: "According to all the authorities, this deed operated to convey an estate in the land for the specified term of fifty years, and its legal effect was to pass to the parties of the second part and their assigns a right of property in the stone and other valuable substances contained in the land." The Metropolitan Marble Company, whose receiver is prosecuting this action, claims under the above-recited deed by virtue of a sublease from the assignee of the term. Of Sullivan, who quarried the marble, the court, in its former opinion, said: "Sullivan appears in the light of a mere trespasser, who had been in the temporary unlawful occupancy of the premises;" and the court added: "The case, as presented by this record, is not one of conflicting titles to the land. It will be observed that at the time the court gave peremptory instructions against the plaintiff the defendant had not put in any evidence whatever." We have no reason to doubt the soundness of the principles laid down by this court on the former occasion, or the correctness of the judgment pronounced by us upon the facts then presented.

At the second trial of the case a different state of facts was developed. In the first place, it was made to appear (for reasons about to be stated) that the receiver's company, the Metropolitan Marble Company, had no right of property in the marble contained in the land. And, secondly, it was shown that, after the Metropolitan Marble Company had suspended work at the marble quarry, Mrs. Mary Brady and her

three daughters executed a written lease of the quarry to the Reverend John P. Callaghan, the rector of the Church of Our Lady, Help of Christians, and that the entry of Sullivan upon the land was made and the marble was quarried and taken away under and in pursuance of this lease to Father Callaghan. The title of Mrs. Mary Brady to the tract of land in question originally came from John La Farge, who, together with his wife, by deed dated February 15, 1852, conveyed the land to one Margaret Lewis. That deed contained the following exception and reservation: "Excepting and reserving therefrom unto the parties of the first part, their heirs and assigns, forever, all mines and minerals which may be found on the above piece of land, with the right of entering at any time with workmen and others to dig and carry the same away." Succeeding deeds in Mrs. Brady's chain of title contained a similar exception and reservation clause. Furthermore, the above-mentioned indenture of November 25, 1892, whereby Mrs. Brady demised and leased the tract of land to James W. Carpenter, Jr., and James A. Phelps for a term of 50 years, contained the clause following: "Excepting and reserving mines and minerals as specified in original conveyance." And, finally, the sublease of June 25, 1895, by the assignee of the term, the Oswegatchie Quarry Company, to the Metropolitan Marble Company (the plaintiff company), contained the same exception and reservation, namely, "Excepting and reserving mines and minerals as specified in original conveyance." Since our judgment upon the former writ of error, the supreme court of New York, in the case of *Brady* v. *Brady,* 31 Misc. Rep. 411, 65 N. Y. Supp. 621, has held that the ownership of the marble in the tract of land conveyed by the above-mentioned deed of John La Farge remained in him by virtue of the exception and reservation of "mines and minerals" contained in his deed. In so holding the supreme court followed the interpretation which the court of appeals of the state of New York gave to

the word "minerals" in a grant or reservation in its opinion in the case of *Armstrong* v. *Granite Co.*, 147 N. Y. 495, 42 N. E. 186, 49 Am. St. Rep, 683. The land here in question is in the state of New York, and the instruments before us are to be construed in accordance with the law of that state as expounded by its courts. Under the decision in the two above-cited New York cases it is clear that neither Mrs. Brady, nor her lessees, Carpenter and Phelps, nor the Metropolitan Marble Company, the sublessee, took any title to the marble in this land, but that the right of property therein remained in John La Farge. It should be noted that no such point was made, discussed, or considered when the case was here before. Now, not only does the present record disclose that the Metropolitan Marble Company had no ownership of the marble in place, but the proofs establish these further facts, namely: That the marble sued for was not quarried by the plaintiff or his company, and was never in the possession of either, and that during the whole time occupied in the mining and removal of it the Metropolitan Marble Company was out of possession of the quarry, and Father Callaghan was in the actual possession thereof under his lease from Mrs. Brady and her daughters. Instead of bringing trover, the plaintiff, waiving the supposed tort, sued in assumpsit for the value of the marble which was so mined and afterwards was used by the defendant in the erection of its church building at East Orange, in the state of New Jersey. Upon the indisputable facts now appearing, can the plaintiff recover in this action? It may, we think, be affirmed with great confidence that by the law of the forum, in such circumstances as exist here, a defendant in trover could defeat the action by showing the right of property in the chattels sued for to be out of the plaintiff, and in a third person. *Glenn* v. *Garrison,* 17 N. J. Law, 1. This is the general rule, and it is supported by sound reason; for, if the action could not be defeated by showing that the title to the articles was at the commencement of

the suit in a third person, the defendant might be compelled to pay for the same property again to such third person, he being a stranger to the first suit. *Ekstrom* v. *Hall,* 90 Me. 186, 192, 38 Atl. 106. This rule undoubtedly applies to a case such as this, where the plaintiff elects to sue in assumpsit for the value of the articles converted. Now, it is true, as shown by *Northam* v. *Bowden,* 11 Exch. 70, and other cases cited by counsel for the plaintiff in error, that possession of property may give sufficient title to maintain an action for its conversion against a mere wrongdoer. But in the present case the plaintiff shows no possessory title. The mined marble which is the subject of this suit never was in the possession of the plaintiff or his company. Moreover, when this marble was mined and taken away, the plaintiff's company was not in possession of the land from which it was quarried. It was mined and removed by one who was in the actual, open, exclusive, and peaceable possession of the quarry, claiming it by color of title at least. The marble, after it was mined, was no more the property of the plaintiff or his company than it was when *in situ.*

Whether or not Mrs. Brady is precluded from denying the right of her lessees, Carpenter and Phelps, and those claiming under them, to quarry marble from the land embraced in her lease, is a question not material here. This is not an action to recover damages for the disturbance of a supposed mining right. The action is upon the common counts in assumpsit, and proceeds upon an implied promise by the defendant to pay the value of the marble it used. A right of property in the receiver's company, or at least a possessory title, is the very basis of the action.

We cannot see upon what principle the defendant is estopped from availing itself of the defense that the plaintiff's company had no ownership whatsoever in the marble, the value of which is sued for. This lack of ownership, be it observed, appears not alone by the showing of the defendant,

but is a fact inherent in the plaintiff's case, and demonstrated by his own proofs.

The learned judge below, without ignoring the fact that the ownership of the marble in the land remained in John La Farge under the exception and reservation in his deed, and without detracting from the importance of the fact, put his binding instruction in favor of the defendant rather upon the ground that the title to real estate was involved in the suit. But whether or not, by the two leases executed by Mrs. Brady,—the first to Carpenter and Phelps, and the second to the Reverend John P. Callaghan,—the title to land was drawn in controversy in such a sense as to deprive the court of jurisdiction to try the case, is a question upon which it is not necessary for us to pass. While we are of opinion that the direction given to the jury to find a verdict for the defendant was right upon the whole evidence, we prefer to put our determination distinctly upon the ground that neither the Metropolitan Marble Company nor its receiver had any right of property in or title to the marble sued for, either while it was in place or after it was quarried.

The judgment of the circuit court is affirmed.

THOMAS HARTNEY v. C. H. GOSLING ET AL.

(10 Wyoming 346; 68 Pac. 1118. Supreme Court. May 28, 1902.)

[1]**Ownership without working.** A mining partnership can only exist where several parties co-operate in working the mining property; mere ownership as tenants in common not being sufficient.

[2]**Power to buy but not to borrow.** In a mining partnership pure and simple one partner has no implied authority to borrow money on the credit of the firm, but his implied powers only permit him to bind his copartners by dealings on credit for the purpose of working the mine, where it appears to be necessary or usual in the management of the business.

[3]**A grub stake contract** does not in general constitute the parties partners but it may be enlarged to contain terms which would constitute a partnership.

Outfitting to Alaska. An agreement whereby certain parties furnished one of their number with a fixed amount of money, he to go to Alaska, and prospect for a mine, and they, during his absence, to furnish his family with a stipulated monthly allowance for their maintenance, each of the parties to have a certain prescribed interest in whatever was found, could not be construed as binding the other parties for expenses incurred by the prospecting partner for personal supplies after, or even before, the sum originally furnished had been exhausted.

Swearing to conclusions. In an action against mining partners to recover for supplies furnished one of their number by plaintiff, when the partnership contract did not make defendants liable therefor, it was not error to permit defendants to state that they had not specially authorized the partner to bind them for the supplies.

Error to District Court, Sweetwater County; DAVID H. CRAIG, Judge.

[1]*Anaconda Co.* v. *Butte Co.* 17 Mont. 519; 43 Pac. 924. *Markle* v. *Wilbur*, 21 M. R. 532.

Adventurers testing a prospect under an option contract are partners. *Manville* v. *Parks*, 15 M. R. 565.

[2]Powers of partner to borrow money. *Randall* v. *Meredith*, 76 Tex. 669; 13 S. W. 576.

[3]It is in the nature of a partnership. *Lawrence* v. *Robinson*, 4 Colo. 567. *Abbott* v. *Smith*, 3 Colo. App. 265; 32 Pac. 843.

Letter of one partner. Where a mining partnership contract did not itself make defendants liable for supplies sold one of their number, a letter written him by another partner, authorizing him to buy the supplies, could not have the effect to bind the other partners, in the absence of evidence that they knew of or authorized its being written.

Supplies already bought. Such letter would not bind the partner writing it for supplies bought from plaintiff before it was written.

Such letter would be admissible against the partner writing it as to supplies bought from plaintiff after it had been shown to him.

Exclusion of such letter as against the partner writing it, and as to supplies bought after it was shown to plaintiff, was reversible error, though plaintiff's testimony giving its contents went in without objection, where it was apparent that the court did not regard such testimony as material.

Action by Thomas Hartney against C. H. Gosling and others. Judgment for defendants, and plaintiff brings error. Reversed as to defendant Gosling, and affirmed as to the other defendants.

JOHN H. CHILES, and T. S. TALIAFERRO, JR. (C. M. WATTS, of counsel), for plaintiff in error.

No brief for defendants in error.

POTTER, C. J. The plaintiff in error, Thomas Hartney, brought suit against C. H. Gosling, Dennis D. Waters, John Hartney, H. H. Edgar, John Park, and George L. Young, alleging that said defendants composed a partnership, and that at their special instance and request, on or about February 25, 1899, he loaned the defendants the sum of $500, which they promised to repay to him; that no part of the said sum has been paid by defendants, or either of them, and that there is due to plaintiff from the defendants, and each of them, upon said account, the said sum, with interest. A statement of an account is attached to the petition, and referred to therein, containing one item only, viz.: "February 25, 1899. To money loaned and advanced, $500." Of the defendants named in the petition, three only—Gosling,

Keenan, and Park—appeared and answered. Their answer was a general denial. The case was tried to the court without a jury upon the issue thus framed, and the finding was general in favor of the answering defendants, and the judgment was that plaintiff take nothing, and that the said defendants have and recover their costs from the plaintiff. A motion for new trial was overruled, and plaintiff prosecutes error.

The errors alleged in the petition in error are that the court erred in overruling the motion for a new trial and in rendering judgment in favor of the defendants for costs. The grounds for new trial contained in the motion are that the decision of the court is contrary to law, and not sustained by sufficient evidence; and that said decision is contrary to both law and the evidence; and that the court erred in excluding certain evidence therein set out offered by plaintiff, and admitting in evidence certain testimony therein also set out offered on the part of the defendants. These matters of evidence in respect to which it is charged that error was committed will be pointed out more specifically as we proceed. The dealings out of which this suit arose occurred in Alaska between the plaintiff and George L. Young. The plaintiff provided Young with some money and provisions, and it is claimed that the circumstances were such as to place the defendants, as members of a mining partnership, under a legal obligation to reimburse the plaintiff therefor. Prior to the departure of Young for Alaska, a written agreement was entered into between him and the other defendants. That instrument having been lost, evidence was introduced to show its contents. Young, Keenan, and Park were each examined in relation to the agreement, and there is but little practical conflict in their testimony. Young was to proceed to Alaska, and prospect for gold, and anything found by him was to be owned by the defendants in the following proportions: Young was to own three-tenths, Gosling two-tenths, and each of the others one-tenth.

He was furnished with $700 by the other defendants, each one paying $100, except Gosling, who paid $200. In addition thereto, they agreed to furnish to the family of Young for their support, during his absence, the sum of $14 per month; and the agreement in that respect was complied with. Young testified that if he found a mine containing gold he was to develop the mine and dig out the gold. He did not state in so many words that the agreement contained a provision to that effect, but when asked what he was to do if he found gold he replied that he was to dig it out, and he gave an affirmative answer to the question inquiring if he was to develop the claim. It is doubtless to be understood from his testimony that he construed the agreement as requiring him not only to prospect for a mine, but, if one was found, to develop and work it for the joint benefit of all the parties. Nevertheless, that may have been merely his construction of an agreement that he should go to the country mentioned, and prospect for the joint advantage of himself and those furnishing the money. Mr. Keenan testified that there was nothing in the agreement about developing and working a mine if one should be discovered.

On his examination in chief Young gave his recollection of the agreement as follows: "As far as I understood, the contents of the agreement was they furnished me with money, and they was to pay my family, while I was away, fourteen dollars per month; and, if I found anything, they were to each have one share, and I was to have three shares of whatever I might find." On cross-examination he assented to the following statement of the written contract: "That in consideration of seven hundred dollars furnished to you, and the further consideration of fourteen dollars a month to be furnished to your family for one year, that you agreed to go into Alaska and prospect for gold, and, if properties were found, that you was to receive three-tenths and each of the others one-tenth." He was then asked if the $700 was not all

the other parties agreed to furnish outside of the monthly payment to his family, and he replied, "That is all that I understood." It elsewhere appears that, as Mr. Gosling paid in $200, he was to be entitled to two shares. Mr. Park's version of the agreement was that Mr. Young was to go to Alaska to prospect, and, if anything was found, he was to have three-tenths, Gosling two-tenths, and the witness one-tenth. Mr. Keenan stated the contents of the agreement to be about as follows: "Mr. Gosling put up two hundred dollars; the balance of those named put up one hundred each, which made seven hundred dollars. George Young was to have three-tenths of whatever was found, and Mr. Gosling two-tenths, and those that put up one hundred each one-tenth. We were to pay a certain amount for the support of his family. The exact amount I don't remember, but I know I paid it." The agreement seems to have been made in July, 1897, at Rock Springs, in this state, and Young arrived in Alaska some time in that year. Just when he arrived is not shown, but from incidental references in the testimony it is probable that he proceded to that country very shortly after the date of his agreement. He states that while there he located a claim, and sunk two shafts in it from 24 to 30 feet, but he found nothing in them, and, seeing that it was a failure, he left it. He says it took from 6 to 12 months to do the work, but it is not clear whether he intended to state that the sinking of each shaft or both shafts occupied that much time, and it is probably immaterial. From a consideration of all the testimony it is quite impossible to understand at what particular time during his stay in Alaska the above-mentioned work was done. Had the evidence on that matter been more definite, it might have simplified the question. He met Hartney, the plaintiff, who had preceded him to Alaska, in February of the following year, 1898, and it is reasonably clear that during some of the period succeeding their meeting they were engaged in prospecting and in traveling for that purpose; and

hence, after February, 1898, Young was not engaged solely in the work referred to upon the claim which he located and afterwards abandoned. He does not state, in regard to that claim, that it was located in the names of the defendants, nor does he or any witness give any information as to whose names were used in locating it. It may be assumed, however, that he held the claim for all the parties. What disposition was made of the $700 furnished him is not shown, and it does not appear that he did any other work than that above stated, except that in 1898 he made a prospecting trip in company with Hartney and two others. We understand the testimony of the plaintiff and Young to show that in February, when Young "came down the creek," the plaintiff advanced him $18, and in March he let him have $100, with which sums of money Young bought provisions for his own consumption, and the money was furnished for that particular purpose. The plaintiff states that Young was not working, and had nothing to eat, and that he loaned him the $100 to buy provisions with. That he had to go to Dawson—20 miles below—to buy the provisions, and they lasted him until the plaintiff got through with the clean-up where he had been working. He states that he then intended remaining another winter, and Young also wanted to remain, and he bought the latter provisions for the balance of the $500 sued for. He says that the provisions bought for Young after the loan of $118 were bought on the strength of a letter which Young had received from Gosling, one of the defendants. Young had told him about the "company business," and the parties who were interested with him, and the amounts they had respectively furnished him, and also showed him a letter he had received from Gosling. That letter, however, he had not seen, and he knew nothing about it, if, indeed it had then been received when the $118 was advanced. Before considering the Gosling letter, it may be well to refer to some other matters tending to shed some light upon the

situation of the parties in connection with the purchase of the provisions in question. It seems reasonably clear that after their purchase, which occurred in July, 1898, the plaintiff and Young remained together, sharing the provisions, until February, 1899, when the parties had a settlement, and Young is said to have given a receipt to the plaintiff for $500, including the $118. It is to be understood, we think, that of the provisions which had been bought by plaintiff and shared with Young the proper proportion chargeable to the latter was agreed upon between them as $382. The receipt was lost, and was not, therefore, in evidence, nor was any testimony offered as to its contents or signature, other than the fact that it was given for $500. There does not appear to have been any separation or division of the supplies at any time after their purchase. Plaintiff bought them, and permitted Young to live with him, and share them in common with him. No itemized statement was ever made, nor is there any proof of what was in fact Young's reasonable share of the expense, except the statement of the plaintiff and Young that the amount agreed upon at the settlement was right. After the purchase of the provisions, the plaintiff and Young, with two others, went on a prospecting trip; and it seems from the testimony that during that trip these provisions constituted at least a portion of their means of subsistence. Indeed, nothing is said about any other provisions, and the court is left in the dark as to whether the other parties provided anything or not. On that trip, also, some of the provisions were lost by the upsetting of a boat. After that, Young says, a horse was bought, and "other things," to proceed on the trip, and conveys the impression that a part of the expense subsequently entering into the February settlement included the horse and "other things," although no explanation was offered concerning the later disposition of the horse, if any, or what the "other things" embraced. Young testifies that, if anything had been discovered on that

trip, each of the parties who were with him would have been entitled to a one-fourth interest, and that the defendants here would have had their proportionate share of his one-fourth interest. It is not shown that either of the defendants knew anything about that trip.

Before concluding this statement of the situation, and of the acts of Young while in Alaska, it should be added that the testimony fails to specially disclose what the agreement or understanding was, if any, between Young and the plaintiff at the time of the purchase of the provisions in the summer of 1898. Plaintiff testifies that Young and himself went together and bought their "outfit," and that he paid the bill, and kept an account of what they eat together; and in February following the amount owing by Young was agreed upon between them. The account, however, like every other writing concerned in the case, was lost. It seems that Young received a letter from C. H. Gosling, one of the defendants. That letter he handed to the plaintiff, and it could not be found. The plaintiff offered to prove by the witness Young that at or about and prior to the time of receiving the money sued for he received from Gosling a letter, in which the latter authorized and told him, on behalf of the partnership, to borrow money and supplies from the plaintiff, and that he would see that it was paid, and that the partnership would also stand ready and willing to pay the same. In the offer it was stated that the letter was not in the possession of witness, but had been given to the plaintiff. The plaintiff had not then been examined as to its loss while in his possession. An objection to the offer was sustained. Later on the plaintiff testified that he lost the letter, and he stated that in the letter Young was told to borrow money from all he could, and plaintiff's name was mentioned in it, and to stay another winter and prospect, and that the company would be responsible, and that he (the plaintiff) would get his money back. At the conclusion of the plaintiff's examination as a witness,

his counsel again offered to prove by the testimony of the witness Young, "as to the contents of the letter received by him from C. H. Gosling, that it stated for him to borrow money and supplies of Thomas Hartney, and that the company and himself would stand personally responsible, or words to that effect." The offer was denied.

We deem the above reference to the facts sufficient to permit an intelligible consideration of the legal propositions in the case, although it may become necessary to allude to some particular statements found in the testimony not already mentioned. It is urged that the judgment is contrary to the law and evidence as between the plaintiff and all the answering defendants, and especially as against Gosling. In this controversy the only right of the plaintiff to be considered is his right to recover from Gosling, Park, and Keenan, or either of them, upon the issues made by the pleadings, and upon which the action was tried. To sustain the charge of error in the judgment, counsel for plaintiff contends in the first place, that the agreement between Young and the defendants constituted a mining partnership, and that they became mining partners; and it is urged that Young had implied authority, by reason of the fact of partnership, to pledge the credit of all the defendants, as his partners, by borrowing money or purchasing necessaries for carrying on the concern or business. It is generally, and, we think, universally, held that in a mining partnership pure and simple one partner has no implied authority to borrow money on the credit of the firm. Barringer & A. Mines & M. 752; 2 Lindl. Mines, § 801; *Skillman* v. *Lackman,* 23 Cal. 199, 83 Am. Dec. 96. But what is a mining partnership? The definition given by Mr. Lindley is, "Where several owners unite and co-operate in working a mine" (2 Lindl. Mines, § 796); and that definition is also given by Barringer & A. Mines & M. p. 750. Parties may be tenants in common of a mining property without constituting a mining partnership. The partnership is

constituted when, as such tenants in common or co-owners, they unite and co-operate in operating or working the mine. *Nolan* v. *Lovelock,* 1 Mont. 224; *Congdon* v. *Olds* (Mont.) 46 Pac. 261; *Skillman* v. *Lachman,* 23 Cal. 199; *Charles* v. *Eshleman,* 5 Colo. 106; *Prince v. Lamb* (Cal.) 60 Pac. 689; *Lyman* v. *Schwartz* (Colo. App.) 57 Pac. 735; *Manville* v. *Parks,* 7 Colo. 128, 2 Pac. 212. It is indicated in the case last cited that as a condition to the existence of a mining partnership it is not necessary that the mine be owned by the parties working it, for it is said to be evident that such a partnership may exist as well where the parties have an interest merely in the working of a mine, or in carrying on mining operations, as where they own the mine itself. In the cases which have come under our observation the partnership has been held to exist only where there has been co-operation in working or developing mining property. A mining partnership is distinguished from an ordinary partnership by the absence of the *delectus personarum* which characterizes the latter. In mining partnerships neither death nor bankruptcy of one of the members will dissolve it, nor will a dissolution be worked by the sale of an interest by one of the partners. This principle is largely responsible for the greater limitation upon the implied powers of a partner in a concern of that kind. The implied power of a partner in a mining partnership as to third persons is not held to go further, we think, than authority to bind his copartners by dealings on credit for the purpose of working the mine, where it appears to be necessary or usual in the management and course of the business. In the case of *Manville* v. *Parks, supra,* the other partners were held liable for a debt contracted by the managing partner, where it was shown that the articles purchased were essential to the carrying on of the business and the accomplishment of the purpose of the defendants in working the mine. A mining partnership may not only be created by express contract of the parties, but its existence may be deduced

from the acts of the parties. *Skillman* v. *Lachman, supra.* In that case it was said that: "In the case of an ordinary mining partnership, something more will be required to raise the presumption of liability arising from persons holding themselves out to the world as partners than would be necessary in the case of an ordinary partnership. Such persons, in the absence of other circumstances, cannot fairly be presumed to have intended to render themselves liable to all the consequences of a commercial partnership." In that case the authorities bearing upon the subject are reviewed, and the whole subject learnedly discussed.

In the case before us it is not perceived how the trial court from the mere acts of the parties, could have found a mining partnership to have existed, so as to confer upon Young implied power to bind the defendants by contracting the debt sued on. The failure of the proof to fix the period when Young was employing his time in sinking the two shafts upon the claim located by him, has already been alluded to. It is true that Young stated the money furnished by Hartney was spent for provisions, etc., before they started out to work the claim, and he responded "Yes" to the question, in substance, whether the money was expended while he was working the claims and preparing to work them, in which all the defendants had an interest. And this question was asked Mr. Hartney: "Was he prospecting after he got these supplies, and during the time he got them, on the claim he got for the company, and had been located by him?" and he answered, "Yes, sir." The witness had immediately before stated that Young used the supplies to keep body and soul together while he was prospecting for the company out there. Yet it appears that the provisions were not obtained through the bounty of Hartney until the summer of 1898, after Young had been in the country nearly a year; and after they were obtained he was on a prospecting trip with Hartney and others, and it is apparent that while on that trip he could not have been working

on the claim which he testified to having located and abandoned. We cannot attach to the affirmative responses to the leading questions above mentioned sufficient importance to outweigh all the other facts and inferences to be legitimately derived from the rest of the testimony. The plaintiff had the burden of proof. These defendants—at least Keenan and Park—had not held themselves out as partners of Young, and the evidence fails to satisfy us that Hartney was led into parting with his money by reason of the working of a mine owned by the defendants in common with Young. If he based his right upon the fact that the defendants were joint owners of a mine, and that they were united, and had co-operated in working it, he should have shown that fact. To say the least, the evidence upon that matter is so indefinite and uncertain that it furnishes no ground for reversing the judgment of the court. Even if there was an agreement providing that Young should work a mine when discovered, we think it quite impossible to hold that the court erred in not finding that a mine had not only been discovered, but was being worked by Young in co-operation with defendants, and that the money and provisions provided by the plaintiff were obtained for the purpose of working the mine, and as essential to its proper management in the usual course of business. But Keenan testified that the agreement contained no provision respecting the work or development to be done upon a mine should one be discovered, and in stating the contents of the lost instrument no witness mentioned a provision of that character. Young, it is true, replied affirmatively when he was asked if he was to develop a mine if he found one, and he said that if he found gold he was to dig it out. That may have been, and we are inclined to think it was, merely his interpretation of his duty under the contract. At any rate, the evidence would not authorize an appellate court to reverse the trial court, and hold that the agreement was one for the joint working of a mine after its discovery and location. There

was no evidence of an agreement other than the one reduced to writing. Both Keenan and Park testified that they had not authorized Young to borrow money, or to contract debts in their name or for the company.

If any liability rests upon the defendants, as mining partners, to pay the claim of the plaintiff, it must arise in consequence of the agreement entered into between them and Young. In view of the evidence, we are of the opinion that the learned district court would have been justified in holding that the contract did not, by its terms, contemplate the subsequent working of a mine by Young. The contract seems to have approached more nearly a prospecting or "grub stake" contract, than a mining partnership. A prospecting contract is said to partake of the character of a qualified partnership, although Mr. Lindley, in his valuable work, regards the term "partnership" to be a misnomer as applied to the ordinary "grub stake" contract. 2 Lindl. Mines, § 858. That author describes such a contract in its usual scope to be simply a common venture, wherein one party, called the "outfitter," supplies the "grub," and the other, called the "prospector," performs the labor, and all discoveries inure to the benefit of the parties in the proportion fixed by the agreement. Id.

We entertain no doubt but that such a contract may go further, and so provide, relative to the duties and rights of the parties thereunder, as to constitute a partnership; or it may so provide as to render the outfitter liable for the personal expenses of the prospector after the exhaustion of the money furnished at the outset. The liability, it would seem, must depend upon the contract which the parties have made, the same as in any other case. The agreement in this case definitely fixed the amount of money to be furnished to the prospector. The parties did not contract to supply him indefinitely with provisions and supplies; nor, indeed, did they, in terms, agree to furnish those things. Doubtless, it was

understood that the money supplied to Young would be employed by him in paying his necessary traveling expenses and in securing the supplies, such as provisions and tools, to enable a performance on his part of the agreement. But the agreement was not to provide him with necessaries while he furnished his services. The defendants paid him a certain sum of money, and agreed, during his absence,—whether for one year or longer is immaterial,—to furnish his family with a monthly allowance for their maintenance; and, in addition thereto, he was to receive an interest in any property discovered by him. The prospector himself states that the $700 was all that he understood the other parties to the contract were to pay. It is evident that by virtue alone of the agreement he could have had no legal recourse upon them for more money to pay his personal expenses. We are unable to see how the contract can be extended by judicial construction to cover additional liability on the part of those furnishing the money portion of the capital for the common enterprise. To do so would, in effect, be equivalent to holding that when one has merely agreed to provide, and does provide, a definite sum of money to another, to use in prospecting for mineral, by that act alone he becomes bound for all expenses incurred by that other for personal supplies after, or even before, the sum originally furnished has been exhausted. We do not think that is the law. We have not been cited to any case announcing such a doctrine, and we are aware of no principle in the law that would authorize it. This is not a case, at least as to Keenan and Park, of persons holding themselves out to the world as partners. Young told the plaintiff that the defendants had furnished him certain sums of money. He did not inform him that they had agreed to furnish more, or to be responsible for more, except to show him the letter of Gosling, which will be noticed later on; and it would not have bound those not assenting to it, if he had so represented the agreement. Keenan testified that he did not expect Young

to remain in Alaska after the money supplied him had been spent. Of course, the individual understanding of the witness could not have changed the provisions of the contract, but we think it did not have that effect. The contract was not shown to contain anything authorizing the prospector to continue at the further expense of the other parties after exhausting the money received by him. We think, therefore, that the character and provisions of the agreement were not such as to impose the alleged liability upon the defendants.

There was no error in permitting the defendants Keenan and Park to state that they had not authorized Young to borrow money or contract debts on their individual behalf or on behalf of the company or association. It was not permitting partners to testify as to agreements between themselves limiting their liability. Not being otherwise responsible, they were allowed to testify that they had not specially authorized the contracting of the debt. The cases cited to show that partners cannot evade liability for debt contracted by one member of the firm, by proof of an express agreement denying his power to incur debts without consent of the others unless the creditor had notice of the agreement, are not applicable.

Finally, it is contended that the court erred in excluding the offer to prove by the witness Young that the letter he received from the defendant Gosling directed him to borrow money and supplies from the plaintiff, and that he and the company would be responsible for the amount; and, in view of the testimony of the plaintiff stating some of the contents of the letter, that the judgment should have gone against Gosling, if not all of the defendants. The plaintiff stated that in the letter Young was directed to borrow money, and stay another winter and prospect, and that the company would be responsible, and the plaintiff would get his money back. If admissible at all, it does not necessarily follow from the fact that the above was brought out in the testimony of

Hartney that the exclusion of the offered testimony was harmless, for the reason that the offer was not confined to proof of promised liability on the part of the company, but embraced a statement that the writer of the letter would be also "personally" responsible. As the offer did not go to the extent of tendering proof that Keenan and Park knew of the letter, or that they had authorized it, or assented to it, it could not have affected them; and, strictly speaking, as against them the letter would not have been admissible, and as to them, therefore, no error was committed in rejecting the offer. Gosling possessed no more power than Young to bind the other parties. But under our statute judgment may be given for or against one or more of several defendants. Rev. St. § 3752. Under such a statute it is well settled that, where several persons are sued as partners, and part only prove to be liable, or to have authorized the contract, or are found to be partners, judgment may be rendered against them and for the others; and this is the rule in actions on contract as well as in tort. In actions on contract the statute changes the common-law rule. Bates, Partn. § 1094; *Roggenkamp* v. *Hargreaves,* 39 Neb. 540, 58 N. W. 162; *Lampkin* v. *Chishom,* 10 Ohio St. 450; *Morgan* v. *Righetti* (Cal.) 45 Pac. 260; 11 Enc. Pl. & Prac. 853; 15 Id. 960. See also, *Rainsford* v. *Massengale,* 5 Wyo. 1, 35 Pac. 774; *Fisher* v. *Hopkins,* 4 Wyo. 379, 34 Pac. 899. Hence the question arises whether the evidence offered was admissible as against Gosling as tending to show his liability for the claim sued on, or any part of it. The loss of the letter was established, and, if it would have been competent and relevant to the issue, evidence to prove its contents would have been equally proper. It is clear that it would not have been material as to the $118 advanced in February and March, 1898, for the reason that at that time the plaintiff had not seen the letter, and therefore did not part with his money in reliance upon it. But he testified that he bought the provisions for Young in the sum-

mer on the strength of the letter. As to the debt then incurred by Young, we are of the opinion that the evidence offered was competent and relevant as tending to show that Gosling had, as to the plaintiff, held himself out as a partner of Young, and authorized him to borrow money from the plaintiff. Indeed, the testimony of the plaintiff that went in without objection purporting to give the contents of the letter had the same tendency. But from the exclusion of the same character of testimony when twice offered it is evident that the trial court did not regard the matter as material, and it is evident also, we think, that counsel on both sides so understood the mind of the court, and did not, therefore, further pursue the theory of individual responsibilty on the part of Gosling. We are not advised by the record whether Gosling was or was not present at the trial. But, if he was it may reasonably be assumed that, if he could have given an explanation of the letter favorable to himself, it was not deemed necessary for him to do so, in view of the very plain indication that the court would entirely disregard the testimony of the plaintiff concerning the letter. We do not conceive it incumbent on us to hold that the testimony as it stood was sufficient to charge Gosling before we should disturb the judgment as to him, because it is apparent to our mind that the case was decided wthout any reference to the letter as bearing upon the personal liability of the writer thereof, and that it was treated as though not in the case. For that reason also it seems to us that the exclusion of the offered testimony cannot be said to have been harmless as merely cumulative.

The testimony offered on the subject of the letter should have been admitted, and, in view of the situation above stated, according to our understanding from the disclosures of the record, its exclusion amounted to prejudicial error. To show that the defendant Gosling had so acted as to entitle plaintiff to believe him to be a partner with Young, and as such to

have authorized the latter to borrow money from the plaintiff, would not be fatally variant from the allegation of partnership in the petition. *Cornhauser* v. *Roberts,* 75 Wis. 554, 44 N. W. 744; *Reber* v. *Manufacturing Co.,* 12 Ohio St. 175; *Hancock* v. *Hintrager,* 60 Iowa, 374, 14 N. W. 725. In *Cornhauser* v. *Roberts, supra,* it being contended by counsel that where one is sought to be charged as a partner on the ground that he has held himself out as such, and so induced credit to another as a copartner, the complaint must set out the facts essential to charge the one who is not in fact a partner, but has, by his act, misled the creditor, and that recovery cannot, in such case, be had upon a general allegation of partnership, it was said by the Wisconsin court: "We think this contention of the learned counsel for the defendants is not sustained by principle or authority. The complaint alleges that the defendants are indebted to plaintiff as partners for goods sold and delivered to them as partners. The defendants, by their answer, deny the partnership. It becomes necessary, therefore, for the plaintiff to prove the partnership in order to maintain its action. This it may do by direct proof of the partnership, by the admissions of the several defendants that they were at the time partners, or by other acts which show that they were holding themselves out as partners." And, further, it is said that "the mere fact that the evidence is also evidence upon which an estoppel in pais might be based is no objection to the evidence as admissible to prove the alleged partnership." See, also, *Rainsford* v. *Massengale,* 5 Wyo. 1, 35 Pac. 774. In the case cited from Iowa it was said: "Appellant was sued as a partner, and any evidence which tended to show that he was liable to the plaintiff as a partner was competent. It was neither proper nor permissible to plead evidence." Should the effect of the evidence be to establish a guaranty for a debt to be incurred by Young, rather than a holding out as partner, we incline to the opinion that it would constitute a total failure of proof.

Packard v. *Snell,* 35 Iowa, 80. Upon that theory the letter would not be admissible or relevant. But, in connection with the previous agreement, we think, upon a careful scrutiny of the offer as made, its tendency was to show that the direction to borrow money was made to Young upon the theory of a partnership. What would be developed upon its admission and subsequent explanation by the defendant we cannot know.

From objections made on the trial it seems that counsel for defendants took the view that the transaction in the summer of 1898 did not amount to a loan of money, but that, as provisions were furnished to Young in the manner hereinbefore stated, there could be no recovery therefor under the petition alleging an indebtedness for money loaned. That might depend altogether upon the arrangement between plaintiff and Young. It may be that plaintiff agreed to provide Young's share of the money necessary to buy the required supplies, the amount thereof to be subsequently determined upon between them; and that the matter was treated and considered strictly as a loan of money, although the money itself was handed over to the proprietor of the store where the goods were purchased, instead of to Young. We are not prepared to say that the facts are not susceptible of that interpretation. The receipt given when the parties separated was for money. Plaintiff states that both of them bought the goods, although he furnished the money. Mr. Keenan testified that upon the plaintiff's return the latter said to the witness that he gave Young $500 "for you fellows up there." As the case must be remanded as to Gosling for the manifest error in excluding the offered testimony, and there must be a new trial, we do not care to express a decided opinion as to his liability upon the testimony before us; and hence we do not wish to be understood as holding that the facts at the former trial established a case of a loan of money to Young. Upon the facts brought out at that trial, we think the question may be regarded, perhaps, as a close one. Neither have we considered

whether, if the plaintiff's case is other than that for money loaned, it is such a one as would authorize an amendment to the petition; nor have we gone into the question of the effect, if any, upon Gosling's liability of the arrangement between Hartney, Young, and their two companions on the prospecting trip for a joint interest in their discoveries.

For the error in excluding the testimony concerning the letter of Gosling, the judgment, as between him and the plaintiff, must be reversed, and the case, as between them, remanded for a new trial. There is no error in the record as to the defendants Keenan and Park.

The judgment in their favor will be affirmed.

CORN and KNIGHT, JJ., concur.

[1]THE AJAX GOLD MINING CO. v. HILKEY ET AL.

(30 Colorado 115; 69 Pac. 523. Supreme Court. June 2, 1902.)

[2]**Injunction pending appeal.** Only in unusual cases will the Supreme Court consider an application for an injunction pending the appeal. But the lower court retains full jurisdiction to preserve the property by the writ and in proper case should not hesitate to exercise it.

The fact that a new judge has taken office since the original writ issued does not affect the jurisdiction of the *nisi prius* court over the enjoined premises pending the appeal.

Appeal from District Court, Teller County.

[1]Styled *Ajax G. M. Co.* v. *Triumph G. M. Co.* in the Pacific Reporter.

[2]An appeal does not stay the operation of an injunction. *Bullion Co.* v. *Eureka Hill Co.* 15 M. R. 449. But the court granting the writ has the right to vacate it if it was allowed in excess of the court's jurisdiction. *Same* v. *Same*, 5 Utah 182; 12 Pac. 660.

That the title has been decided for defendant is good reason for denying injunction although plaintiff may have right of appeal. *Boston Co.* v. *Montana Co.* 26 Mont. 146; 66 Pac. 752.

As to practice on application for the writ pending appeal see *Central R. R.* v. *Standard Oil Co.* 7 M. R. 628, and notes.

The appellate court is not inclined to interfere with the discretion exercised by the lower court in granting or refusing the writ. *Maloney* v. *King*, 21 M. R. 278.

When standing on appeal the discretion as to injunction should be exercised by the lower court. *Stearns Co.* v. *Brown*, 114 Fed. 940.

The supreme court may enjoin pending the appeal. *Finlen* v. *Heinze*, 27 Mont. 107; 69 Pac. 829.

After final decree rendered the court has no power to add to the record a paragraph retaining jurisdiction for the purpose of enjoining trespass. *Finlen* v. *Heinze*, 28 Mont. 548; 73 Pac. 123.

The jurisdiction of the circuit court of appeals is appellate only and it cannot direct the lower court to issue an injunction. *N. Bloomfield Co.* v. *U. S.* 83 Fed. 2.

In *Erhardt* v. *Boaro*, 15 M. R. 447, the federal supreme court on reversing the case directed the circuit court to restore the injunction.

A supersedeas to an appeal from an order dissolving an injunction continues the injunction in force. *New River M. Co.* v. *Seeley*, 117 Fed. 981

Action by the Ajax Gold Mining Company against the Triumph Gold Mining Company and others. Judgment for defendants, and plaintiff appealed. Application for a temporary injunction to preserve the property in dispute pending appeal. Dismissed.

COLBURN, DUDLEY & HELM, for appellant.

W. O. TEMPLE and S. D. CRUMP, for appellees.

PER CURIAM. This is what is commonly known as an "apex suit." In the district court before trial a temporary injunction was granted to plaintiff, by which defendants were restrained from removing ore from the vein in dispute, but upon final hearing, the decision upon the merits being in favor of defendants, it was dissolved. After the appeal was lodged in this court, appellant applied here for an injunction to preserve the property in controversy during its pendency. This application was denied without prejudice, and leave granted to present the same to the district court, which by section 144 of the Civil Code of 1887 is authorized to grant writs of injunction pending proceedings in the supreme court on appeal or writ of error. Appellant then made his application there; but the court, then presided over by a different judge from the one before whom the trial was had, refused to hear it upon the merits, apparently because he questioned the jurisdiction of a trial court to entertain or grant such applications after the cause was removed to an appellate court. He seemed also to have some doubt as to the propriety of the same court that heard and decided the cause passing upon an application for an injunction after final judgment and pending an appeal, especially when presided over by a judge other than the one before whom the trial was had. Appellant thereupon filed in this court a petition asking permission to renew his application, which was granted; the court reserv-

ing, however, the right to determine upon the hearing whether it would assume jurisdiction. At the time originally set for its hearing, appellees were not prepared, and a temporary writ was issued to hold until further order of the court. Appellees have now appeared, and they object to the exercise of jurisdiction by this court, and also contend that under the showing made by them the writ, in any event, should not go.

In the case of *Johnson* v. *Young,* 13 Colo. 382, 22 Pac. 769, it was declared to be the rule that only in cases where there exists some unusual or extraordinary reason why this court should assume such jurisdiction will it be entertained. The appellant insists that unusual and extraordinary conditions do prevail in this case. If this was the only application likely to be presented to us, possibly we would resolve the doubt in favor of appellant, and assume jurisdiction. It is urged by counsel that the consideration which the court must necessarily give in ascertaining whether it will take jurisdiction will consume as much time and involve as much labor as would be required to pass upon the merits. That may be true, and, if this was the only application with which we are to be confronted, the suggestion might be controlling. But following the established practice, we shall deny the application, and give to the appellant leave to renew the same with all convenient speed before either of the judges of the trial court. In view of this conclusion, we deem it not only a matter of justice to appellant, but entirely appropriate, to make some further comments.

Where an appeal has in good faith been perfected, we assume that trial courts will be liberal in allowing an injunction to preserve the status quo, when, if awarded the appellees can be protected against all loss by a sufficient bond, and when, if refused, the very object of the appeal would be thwarted. The fact that in cases like this the temporary writ which was allowed before the trial was vacated when judgment was pronounced on the merits should not deter the trial

court from protecting the rights of the parties, or interfere with its exercise of a sound judgment, merely because the controversy was decided by it against the contention of the appellant, whose rights pending appeal deserve protection. We observe, also, that upon the showing made upon this hearing, any court which has and assumes jurisdiction ought not for a moment to hesitate to grant the writ; and it is only fair to suppose that it was not awarded by the judge of the district court because of his doubt of jurisdiction, and of his natural hesitancy in reviewing the action of an associate. The chief assignment of error upon which appellant relies for reversal is based upon a certain instruction given by the trial court, which is, to say the least, of such questionable propriety, that the property in dispute should be preserved to await the final decision on the appeal.

Again, we reassert what was stated in the case of *Johnson* v. *Young, supra,*—which probably was not called to the attention of the court below,—that the district court has undoubted jurisdiction, which should be exercised, to entertain this application, though the cause has been removed by appeal to this court. While the district judge, in the circumstances disclosed by this record, and for the reasons suggested, may have been embarrassed in passing upon this motion when first presented, we apprehend that with this opinion before him, in which the jurisdiction and duty of trial courts and judges are pointed out, there will now be no hesitancy by him or his associate judge in giving a hearing to appellant. For these reasons, we think appellant's rights will be protected, though we do not directly award the appropriate relief. In the meantime, and until final action in the district court upon the merits of the motion, the temporary writ heretofore issued herein will remain in force. It will be set aside when the fact is properly made known to us that such final action is there had.

Application dismissed.

NATIONAL OIL AND PIPE LINE CO. ET AL. v. RICHARD TEEL ET AL.

(95 Texas 586; 68 S. W. 979. Supreme Court. June 16, 1902.)

[1]**Option holder not treated as purchaser for value.** The assignee of a contract which does not convey an interest in land, but only an option, is not protected against defects which could be asserted against his assignor, as protection to purchasers for valuable consideration extends only to cases where they have purchased the legal title.

The contract was within Rev. St. Art. 309, declaring "written instruments not negotiable by law" subject to all defenses in the hands of a purchaser that might be asserted against the original parties.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Suit by Richard Teel and wife against the National Oil & Pipe Line Company and others. There was a decree of the Court of Civil Appeals (67 S. W. 545) affirming a decree for plaintiffs, and defendants bring error. Affirmed.

WATTS, CHESTER & ELLISON, E. R. SPOTTS, and A. E. AMERMAN, for plaintiffs in error.

[1]**Option is revocable at will. Not assignable when given to purported agent.** *Snow* v. *Nelson*, 22 M. R. 32.

Lost by failure to promptly answer telegram. *Childs* v. *Gillespie*, 147 Pa. 173; 23 Atl. 312.

Time is of the essence of an option contract for the sale of a mine. *Swank* v. *Fretts*, 209 Pa. 625; 59 Atl. 264. *Merk* v. *Bowery Co.* 31 Mont. 298; 78 Pac. 519. Held not of the essence on sale of coal lands. *Pa. M. Co.* v. *Martin*, 210 Pa. 53; 59 Atl. 436.

Time is not necessarily of the essence of a mining sale and delay may be excused so as to not defeat specific performance. *Hosmer* v. *Wyoming Co.* 129 Fed. 884.

Fraction of a day not considered. Discussion of time in general. *Tilton* v. *Sterling Co.* 28 Utah 173; 77 Pac. 758.

CRUSE & NOLL and SMITH, CRAWFORD & SONFIELD, for defendants in error.

GAINES, C. J. This suit was brought by the defendants in error to cancel two certain contracts which purported to convey to Chas. A. Nicholson the right to bore for and take away the oil, gas, and other minerals, each upon a distinct tract of land. Nicholson assigned his right under both contracts to John F. Mundy, who in time conveyed his right in one tract to the National Oil & Pipe Line Company and in the other to the Empire State Oil, Coal & Iron Company. Nicholson and each of his successors in title were made parties defendant. Nicholson and Mundy disclaimed. The defendant companies made defense, and upon the trial judgment was rendered against them. Upon appeal the judgment was affirmed.

The plaintiffs, in their petition, alleged that the contracts were procured by the fraud of Nicholson; that no consideration was paid therefor; and, in effect, that they were void for want of mutuality.

The defendant companies, answering, denied the allegations of the petition, and pleaded that they were purchasers for value, without notice of the fraud of Nicholson.

The trial court found as a matter of fact that the contracts were procured by fraud; that the assignments to Mundy and to the defendant companies were made for value, and without actual notice of the alleged fraud; but also found that the plaintiffs, at the time of the transfer, were in actual possession of the lands, and therefore concluded, as a matter of law, that they had constructive notice. But the court of civil appeals (67 S. W. 545) reversed the ruling of the trial court upon the question of constructive notice, and held that, since the possession of the plaintiffs was entirely consistent with the rights attempted to be secured by the contracts in question, such possession did not affect purchasers with notice of

the infirmity of the contracts. They, however, affirmed the judgment upon other grounds.

In the court of civil appeals the appellants assigned error as to the finding of the trial court that the contracts were procured by fraud. But the court of civil appeals—presumably for the reason that in their opinion the appellants were protected as purchasers for a valuable consideration without notice—did not pass upon the question. But, whatever their reasons for the failure to decide the point, the important fact is that they did not sustain the assignment. It must, therefore, be considered by us as if it had been expressly overruled. *Capes* v. *Burgess,* 135 Ill. 61, 25 N. E. 1000. Since we are without jurisdiction to determine a question of fact, and since the plaintiffs in error have not assigned in this court that there was no evidence to sustain the finding of the trial court, we must treat the case as if fraud had been established by the evidence. This brings us to the question, is the plea of innocent purchasers a valid defense to this action? In order to decide this question it is necessary to determine the nature of the contracts under which the plaintiffs in error claim. Viewing the written agreements in the light most favorable to these parties, they do not pass an interest in the lands, but are mere contracts for an option by which they may acquire such interest. A naked agreement, by which one promises to convey to another an interest in land in consideration of money to be paid or acts to be performed by such other, but which does not bind the other to pay or perform the consideration, as the case may be, cannot be enforced. In such case there is a want of mutuality in the agreement. The one party promises to do something; the other does not promise absolutely to do anything; hence there is no consideration to support a contract, and it is void. On the other hand, a promise to give an option is valid if supported by an independent consideration. For example, if a sum of money be paid for the option, the promisee may, at his election, enforce

the contract. Each of the contracts in this case purports upon its face to have been executed in consideration of the payment of one dollar; and, though the plaintiff below pleaded that no consideration was paid, there was no evidence that the recitals as to the consideration in the contracts were not true. Whether the recital of "one dollar"—commonly called a nominal consideration—is sufficient to support the contracts, we need not discuss, though there is very high authority for holding that such recital is sufficient for the purpose. *Davis* v. *Wells,* 104 U. S. 159, 26 L. Ed. 686. Treating the contracts as if supported by a consideration, the question recurs, can the assignee of such a contract, or the vendee of the right secured by it, shield himself against the fraud of his assignor in its procurement by showing that he is a purchaser for value, without notice of the fraud? We have found but one case in our Reports in which a like question was considered, and it seems decisive of the point against the plaintiff in error. In *York's Adm'r* v. *McNutt,* 16 Tex. 13; 67 Am. Dec. 607, McNutt gave one Hughes a bond for title for a tract of land, the consideration being money won at cards. Hughes sold the land to one Cox, who sold again to York. It was held that the fact that York occupied the position of an innocent purchaser did not entitle his administrator to recover the land. In disposing of the case Chief Justice Hemphill says:

"It must be admitted that there is great apparent hardship in affecting subsequent vendees with all the equities, though latent, which may subsist between the vendor and the first vendee, where the sale is only of the equitable title, and especially so where the rule is well established that a subsequent purchaser without notice will be protected against the equities of the vendor or those claiming in privity under him. But it appears very clear from the authorities that the protection given to purchasers for valuable consideration without notice extends only to cases where they have taken a conveyance; or, in other words, where they have purchased the legal title. Dart, Vend. p. 462; *Snelgrove* v. *Snelgrove,* 4 Desaus. 274; *Alexander* v. *Pendleton,* 8 Cranch, 462, 3 L. Ed. 624; *Boone* v. *Chiles,*

10 Pet. 177, 9 L. Ed. 388; *Vattier* v. *Hinde*, 7 Pet. 252, 8 L. Ed. 675. But where the purchase is only of the equitable, it is taken with all its imperfections and equities, notwithstanding a valuable consideration may have been given, and there may have been no notice of the equity or defense against the title. *Chew* v. *Barnet*, 11 Serg. & R. 389; *Reed* v. *Dickey*, 2 Watts, 459. In the case of *Chew* v. *Barnet*, 11 Serg. & R. 389, the court say that: 'When it is asserted that a purchaser for a valuable consideration takes the title free of every trust or equity of which he has no notice, it is intended of the purchase of a title perfect on its face; for every purchaser of an imperfect title takes it with all its imperfections on its head. It is his own fault that he confides in a title which appears defective, and he does so at his peril.' "

When it is considered that, but for the illegality of the consideration of his bond for title, Hughes acquired thereby a perfect equitable title to the land,—a title as effective under our system of practice as the legal title,—it seems that this is a very pronounced decision. By the contracts in the present case Nicholson acquired no title to the lands; at most, he secured only the right to acquire an interest in the lands by complying, at his election, with the stipulations on his part. Until compliance, he had no legal title in the lands themselves; and, as a rule, it is only the purchaser of the legal title who can assert the equity of an innocent purchaser. If Nicholson or Mundy had so complied when the latter made the sales to the defendant companies, their position may have been different.

Furthermore, the instruments being merely contracts by which Nicholson could acquire an interest in the lands, it seems to us they fall within the rule of "written instruments not negotiable by law," with reference to which article 309 of our Revised Statutes provides that: "The assignee of any instrument mentioned in the preceding article may maintain an action thereon in his own name, but he shall allow every discount and defense against the same which it would have been subject to in the hands of any previous owner before notice of the assignment was given to the defendant; and in

order to hold the assignor as surety for the payment of the instrument, the assignee shall use due diligence to collect the same."

Our conclusion upon the point considered renders it unnecessary for us to pass upon the questions learnedly discussed in the opinion of the court of civil appeals.

For the reasons given, the judgment of the court of civil appeals and that of the district court are affirmed.

Affirmed.

AARON VAN ETTEN ET AL. v. LUCEBA A. KELLY.

(66 Ohio State 605; 64 N. E. 560. Supreme Court. June 24, 1902.)

[1]**Option to sink or pay rent.** An oil lease which required certain wells to be completed within stated times contained the following: "In case no well is completed within thirty days from this date, then this grant shall become null and void, unless second party shall pay to first party thirty dollars each and every month in advance while such completion is delayed." *Held*, that this did not constitute a promise or obligation to pay rental; and *held*, further, that the lessee had the option to complete wells or pay rentals to keep the lease alive, and that upon breach of the agreement to complete wells no action would lie for the recovery of rentals.

(Syllabus by the Court.)

Error to Circuit Court, Wood County.

Action by Luceba A. Kelly against Aaron Van Etten and others. Judgment for plaintiff, and defendants bring error. Reversed.

The action in the court of common pleas was for the recovery of rental claimed to be due under the terms of an oil lease made by Luceba A. Kelly to one Scott Blair. The following is a copy of the lease, except signatures:

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[1]The forfeiture clause or the "null and void" clause is for the benefit of the lessor and the lessee cannot voluntarily suffer forfeiture. *Bartley* v. *Phillips*, 18 M. R. 542. But where there is no covenant either to sink or to work the lessee may abandon. *Glasgow* v. *Chartiers Oil Co.* 17 M. R. 523.

A parol agreement subsequent to an abandonment of a written lease constitutes a new contract and is not a mere waiver of the forfeiture. *Ohio Co.* v. *Detamore*, — Ind. —; 73 N. E. 906.

That lessee has sunk and found no oil is not necessarily a determination of his rights. *Logansport Co.* v. *Ross*, 32 Ind. App. 639; 70 N. E. 544.

"In consideration of the sum of one hundred dollars, the receipt of which is hereby acknowledged, Luceba A. Kelly, first party, hereby grants unto S. Blair, second party, his successors and assigns, all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil, gas, or water; to erect and maintain all buildings and structures and lay all pipes necessary for the production and transportation of oil, gas, or water taken from said premises. Excepting and reserving, however, to first party the one-sixth part of all oil produced from said premises, to be delivered in the pipe line with which second party may connect its wells, namely:

All that certain lot of lands situated in the township of Freedom, county of Wood, in the state of Ohio, bounded and described as follows, to wit:

The south half (½) of the northwest quarter of section No. twenty (20), town five (5), range twelve (12) east, containing eighty acres, more or less.

To have and to hold the above premises on the following conditions:

If gas only is found, second party agrees to pay three hundred dollars each year for the product of each well while the same is being used off the premises, and the first party to have gas free of cost to heat three stoves in dwelling house during the same time. Whenever first party shall request it, second party shall bury all oil and gas lines, and pay all damages done to growing crops by reason of removing and burying said pipe lines or in drilling said wells.

No well shall be drilled nearer than 300 feet to the house or barn on said premises, and no well shall occupy more than one acre.

In case no well is completed within thirty days from this date, then this grant shall become null and void unless second party shall pay to said first party thirty dollars each and every month in advance while such completion is delayed, payable at first party's residence.

The second party shall have the right to use sufficient gas and water to run all necessary machinery for operating said lease, and also the right to remove all its property at any time.

The east forty acres of said land shall be drilled first. Second party agrees to complete a well every sixty days from date hereof on said east forty acres until six wells are completed, including the first well, and all lines must be protected. Second party further agrees to complete a well every ninety days on the west forty after the completion of the sixth or last well on the east forty acres.

It is understood that the monthly rental shall apply to any well or wells not completed as herein specified. It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, and assigns. This lease to be void after fifteen years from date hereof.

In witness whereof the parties have hereunto set their hands and seals this 15th day of September, A. D. 1896."

Neither the lease, nor any transfer of any interest therein, was ever recorded.

After stating in proper form the making of said lease, and its terms and conditions, the petition of the said plaintiff below, Luceba A. Kelly, proceeds as follows:

"That said Blair on said 15th day of September, 1896, took said lease in his own name, but in fact for and on behalf of defendants, excepting and reserving one-eighth interest in and to said lease which was owned by said Blair, and afterwards the defendant Henry Bowlus purchased the said interest therein belonging to said Blair.

"That said lease is held and owned by said defendants under and subject to all the terms and conditions in said lease therein mentioned and read, and that said defendants, and each and every one of them, in accepting said lease and operating same as hereinafter alleged, have become liable to the payment of any moneys there may be due as rental of said lands. That according to the terms of said lease, the said defendants did drill the first well upon the east forty acres of said premises, and completed the same within the time provided for in said lease, and sixty days thereafter they, the said defendants, did drill and complete another well on said east forty (40) on said premises. That according to the terms of said lease, in the month of March, and on the 15th day of said month 1897, there should have been another and third well completed on the said east forty acres on the said lands.

"To complete said third well the defendants, each and every one of them, have wholly failed, refused, and neglected to do, and thereupon and thereby they became and are liable to the payment of said sum of thirty ($30) dollars per month as long as the completion of said third well is delayed.

"And the said plaintiff further says that for the last five months past said defendants have wholly failed and refused to operate the wells they have so drilled, and have failed to operate the same, so that this plaintiff has received no benefit therefrom.

"Yet the said defendants have failed, refused, and neglected to either cancel said lease or operate said wells or pay said rental.

"Wherefore said plaintiff prays that she may have judgment against said defendants for the sum of three hundred and ninety ($390) dollars, together with interest thereon, as follows."

Then follow installments of rental amounting to $390, with interest.

The defendants below in their answer denied substantially all the averments of the petition, and pleaded that oil in paying quantities could not be produced on said premises, and that, after ascertaining that to be so, they had offered to surrender and cancel the lease, and also averred that, by a proper and fair construction of said lease, the defendants below (plaintiffs in error here) were not required to pay any rental whatever to the plaintiff by reason of the failure to drill said wells, or for any other cause. The reply denied the averments of the answer.

Upon the trial the evidence tended to show that Scott Blair took said lease in behalf of himself and the other defendants, except Henry Bowlus, who came in later; that they so understood the matter, accepted the lease, and drilled the two wells thereunder; that Henry Bowlus purchased the interest of Scott Blair after default had been made in completing the third well.

The plaintiff below recovered a verdict against all the defendants for $390. A motion for a new trial was made and overruled, and judgment entered on the verdict.

The circuit court affirmed the judgment, and thereupon the plaintiffs in error came here, seeking to reverse the judgments below.

JOHN D. HOYMAN, BALDWIN & HARRINGTON, and JAMES O. TROUP, for plaintiffs in error.

PETER EMSLIE, for defendant in error.

BURKET, J. The only question worthy of report is as to the true construction of the oil lease in regard to the payment of rentals. All the terms and conditions of the lease in that regard are the following: "In case no well is completed within thirty days from this date, then this grant shall become null and void, unless second party shall pay to said first party thirty dollars each and every month in advance while such completion is delayed. * * * It is understood that the monthly rental shall apply to any well or wells not completed as herein specified."

It was in said lease specified that a well should be completed every 60 days from date of lease on east 40 acres until six wells should be completed thereon, and that a well should be completed every 90 days on the west 40 after the completion of the sixth well on the east 40.

A well was completed on the east 40 within 30 days after the date of the lease, and as to that well there was full performance, and the lease was thereby saved from forfeiture as to the first well. The same is true of the second well. But no third or other well was ever completed, and thereby the agreement in the lease as to completing such other wells was broken, and now the question arises as to the remedy for such breach of contract.

The plaintiff below claims that in the words, "unless second party shall pay to said first party thirty dollars each and every month in advance while such completion is delayed," there lies a promise to pay $30 per month for such delay. This is not tenable. The full force and effect of this "unless" clause, taken by itself, is to give the lessee the option, by making such payment, to continue the lease in force to the end of the term without completing the first well, or upon failure to make such payment, allow the lease to become null and void at the end of 30 days after the date of the lease. *Brown* v. *Fowler,* 65 Ohio St. 507, 63 N. E. 76.

There is no promise or obligation in this lease to pay rental

to the lessor for failing to complete the first well, but only a privilege to pay such rental, at the option of the lessee, to prevent the lease becoming null and void.

As the only monthly rental provided for in the lease is that found in this "unless" clause, and as that rental is to prevent the lease from becoming null and void, it seems fairly clear that the subsequent understanding that the monthly rental should apply to any well or wells not completed as therein specified is for the same purpose (that is, to prevent the lease from becoming null and void), and that, upon failure to pay such monthly rental in advance while the completion of any well was so delayed, the lease, by its terms, became null and void, and the lessor had the option to so treat the lease, and recover possession, or recover for use and occupation, or recover damages for breach of contract to drill the wells specified in the lease; but she could not recover rentals for breach of contract to complete wells, because there is no agreement to pay rentals for such breach, and, there being no such agreement, there can be no breach thereof.

In *Woodland Oil Co.* v. *Crawford,* 55 Ohio St. 161, 44 N. E. 1093, 34 L. R. A. 62, the lessee agreed to drill certain wells, and, upon failure, to pay certain rentals. It was held that the lessor might elect to enforce the contract to drill, or waive that and enforce the promise to pay rental. There the option was with the lessor. Here, as there is no promise to pay rental, the option is with the lessee either to drill or pay rental to keep his lease alive; and, failing in both, the lease becomes null and void, with an option, however, in the lessor to treat it as void, or to sue for damages for breach of the contract to complete the wells as specified in the lease.

As the action below was for the recovery of rentals under the lease, and as the lease contains no promise to pay rentals, the plaintiff, under a correct construction of the lease, has no cause of action for rentals; and the judgment of the lower court must therefore be reversed, and petition dismissed, but

without prejudice to the bringing of such other action for the breach of said contract to complete wells as may be authorized by law.

Judgments reversed, and judgment for plaintiffs in error.

SPEAR, DAVIS, SHAUCK, and PRICE, JJ., concur.

THE BUFFALO ZINC & COPPER CO. v. G. J. CRUMP.

(70 Arkansas 525; 69 S. W. 572. Supreme Court. June 28, 1902.)

A placer location on ore found in leads or lodes is void.

Corporation suing without filing statutory papers. The Arkansas statute provides that every foreign corporation, before it shall be authorized to transact business in the state, shall file with the secretary of state a copy of its charter, and a certificate designating an agent on whom service of process may be had, and that any corporation failing to comply with the act shall be subject to a fine of $1,000, and shall not maintain any suit in the state. Plaintiff corporation sued before the passage of the act, and six months thereafter complied with its conditions. *Held*, that plaintiff's failure to immediately comply with the act did not preclude it from maintaining the action.

The prosecution of a suit is not transacting business within the act.

Lode defined. A lode or vein is a body of mineral or mineral body of rock within defined boundaries in the general mass of a mountain.

Sufficient description. A description of a mining claim as: "Beginning at the N. W. corner of El Williams, 1—16, at a black oak post; thence 1,500 feet north between Sec. 10 & 11 to a dogwood bush; thence 600 feet E. to a dogwood bush; thence 1,500 feet south to oak post in Williams' field; thence 600 feet to place of beginning. This being in the northwest quarter of the southwest quarter, Sec. 11, T. 17, range 15 W.,"—is sufficient; it being presumed, in the absence of any contrary evidence, that "El Williams 1—16" is some well-known natural object.

Adverse possession during limitation period. Where a purchaser of mining claims has held them adversely for the period of limitation, it will be presumed, as against an adverse claimant, that the claims were regularly located.

Immaterial default as to time. Though notices of the location of mining claims were not recorded within 30 days, they are sufficient, if recorded before any adverse rights are acquired.

Possession good against nominal locations. Where locators of mining claims never undertook to develop and maintain them, and other claimants took possession and held and developed them for a longer time than the period of limitation, the title of the last claimants was good, as against any one except the government.

Void homestead entry. The owner of mining locations stopped work thereon temporarily, except annual assessment work on account of lack of transportation for ores, and another person entered the land as a homestead, but without the consent of the mine owner. *Held*,

that, in the absence of an affirmative showing of an intention to abandon, there was no abandonment.

[1]**Resumption after years of failure.** Under Rev. St. U. S. § 2324, requiring a certain amount of labor to be done each year on a mining claim, under penalty of forfeiture, a claimant who has failed to perform the work for some year or years, but resumes work in good faith, is entitled to the property, as against a relocator after resumption.

The burden of proving a forfeiture by the failure of the former owner to perform the annual labor required by law rests upon him who sets it up.

Construction of pleadings. The complaint in an action for possession of a mining lode claim alleged that plaintiff had made a corrected location of the same. The answer denied that plaintiff had any right to make the correction, as defendants had prior to that time located the lands, and were in possession. *Held*, that the legality and sufficiency of the corrected location were not put in issue, but only plaintiff's right to enter on the land to make it.

Appeal from Circuit Court, Marion County, in Chancery; ELBRIDGE G. MITCHELL, Judge.

Action by the Buffalo Zinc & Copper Company against G. J. Crump and others. From a judgment for defendants, plaintiff appeals. Reversed.

S. W. WOODS, for appellant.

W. F. PACE, for appellees.

[1]*Resumption cases.*

Where the original owner began work on the last day of the year he was in time to save the claim. *Emerson* v. *McWhirter*, 21 M. R. 476.

Where the owner resumes before any valid relocation and does the necessary work, his rights are revived under the original location. And in this case it was held that after the lode had been relocated and then abandoned the re-entry of the original owner revived his original title. *Klopenstine* v. *Hays*, 20 Utah 45; 57 Pac. 712.

The owner may resume at any time before new adverse rights attach. *Lakin* v. *Sierra Buttes Co.* 25 Fed. 343. *Lacey* v. *Woodward*, 5 N. M. 583; 25 Pac. 785.

JOHN B. JONES, *amicus curiæ*.

BATTLE, J. This action involves the validity of mining claims. The Buffalo Zinc & Copper Company alleged in its complaint substantially as follows: It was duly organized as a corporation under the laws of the state of Illinois, on the 3d day of June, 1887, for the purpose of doing a general mining and smelting business, and dealing in mineral lands. Since then it has been engaged in such business.

On the 6th of November, 1886, one Rose Ann Kaylor, in accordance with law, located a lead and lode mining claim, described as follows:

"Beginning at the northwest corner of the southwest quarter of the southwest quarter of section 11, in township 17 north, and in range 15 west, and thence running north along the section line 1,500 feet, thence east 600 feet, thence south 1,500 feet, and thence west 600 feet to the place of beginning."

Notice of this location was given, and was duly filed for record in the office of the recorder of the Harrison mining district, in which the land was then situated, and was recorded on the 8th of December, 1886, and was also filed for record on the 21st day of January, 1888, in the office of the recorder of Marion county, where the land lies, and was duly

Certain cases hold that the original owner may re-enter at any time before the relocation is completed. *Pharis* v. *Muldoon*, 15 M. R. 348. *Gonu* v. *Russell*, 12 M. R. 630. Another series is that the relocator after location begun has the same time to complete as an original discoverer. *Little Gunnell Co.* v. *Kimber*, 1 M. R. 536. *Pelican Co.* v. *Snodgrass*, 9 Colo. 339; 12 Pac. 206.

Where the owner enters and resumes he must make substantial performance of the assessment work. *Honaker* v. *Martin*, 17 M. R. 404. *McCormick* v. *Baldwin*, 104 Cal. 227; 37 Pac. 903.

Where a claimant is at work on the last day of the year intending to continue work on the next day, a party who locates before the hour of resuming work is a trespasser. *Willitt* v. *Baker*, 133 Fed. 937.

recorded. This location was named and known as the "Bell Claim."

On the 6th day of November, 1886, one Francis E. Blake lawfully located as a lead or lode mining claim the land lying in the county of Marion, in this state, and known and described as follows:

"Beginning at the northeast corner of said Bell claim, and thence running east 600 feet, thence south 1,500 feet, thence west 600 feet, and thence north 1,500 feet to the place of beginning; being a part of the west half of the southwest quarter and the southwest quarter of the northwest quarter of section 11, in township 17 north, and in range 15 west."

Notice of this location was given, and was duly filed for record in the office of the recorder of the Harrison mining district, where the land was then situated, on the 8th day of December, 1886, and the same was duly recorded; and it was also filed for record in the office of the recorder of Marion county on the 22d day of August, 1890, and was recorded. This location was named and known as the "White Eagle Mining Claim."

On the 20th day of November, 1886, Rose Ann Kaylor and William Kaylor, her husband, for a valuable consideration, sold and conveyed to T. A. Blake all their right, title, and interest in and to the White Eagle and Bell mining claims, and put him in possession of the same.

On the 4th of June, 1887, Francis E. Blake, T. A. Blake, and W. P. Beebe, the owners of the Bell and White Eagle mining claims, for a valuable consideration, sold and conveyed such claims to one Fred C. Exter, who on the 27th of June, 1887, sold and conveyed them to the plaintiff, the Buffalo Zinc & Copper Company, and placed it in the possession of the same.

On the 19th of May, 1898, the plaintiff, in conformity with the law in such cases made and provided, made a corrected

location of the White Eagle and Bell mining claims, so as to conform to the lead or lode of mineral pre-empted, and consolidated the two in one claim, and named it the "White Eagle Lead or Lode Mining Claim." Notice of the location was given, and was duly recorded on the 19th day of May, 1898, in the office of the recorder of the Rush Creek mining district, where the mining claim was then located.

The defendants in this action attempted to make a location of a placer mining claim upon the lands upon which the mining claims of the plaintiff are located. These lands are valuable for zinc ores found in them in leads or lodes, and are not subject to locations of placer mining claims, and the locations of the defendants upon them are therefore void.

The defendants filed an application in the office of the proper land district for a patent to the lands, and notice of the application was published on the 16th of September, 1898. On the 10th day of November next following, plaintiff filed in the same office an adverse claim to the same land, and proceedings on the application for a patent were suspended during the pendency of this suit.

Plaintiff asked for a decree canceling the placer location of the defendants, and declaring that it is the owner of the lands and entitled to their possession, and other relief.

Frank Pace, S. J. Pace, and Henry Pace brought an action against the plaintiff, Buffalo Zinc & Copper Company, S. W. Woods, and the defendants in the action instituted by the Buffalo Zinc & Copper Company, to wit, G. J. Crump, B. J. Carney, J. C. South, M. N. Dyer, Z. M. Horton, De Roos Bailey, W. F. Pace, and Arthur N. Sager, to recover the possession of the land claimed by the Buffalo Zinc & Copper Company in its complaint, and claimed to be the owners by virtue of a placer mining location made on the 11th day of April, 1898.

The latter action was transferred to the equity docket, and by consent the two actions were consolidated and heard as one.

Frank, S. J., and Henry Pace answered the complaint of the Buffalo Zinc & Copper Company substantially as follows:

They admitted that Rose Ann Kaylor, on the 6th day of November, 1886, attempted to make the location named and known as the "Bell Claim," and that Francis E. Blake on the same day attempted to make the location named and known as the "White Eagle Mining Claim," and denied all the other allegations in the complaint. They say that the pretended location of Rose Ann Kaylor was illegal, because one E. C. Bartlett on the 11th day of March, 1885, made a location of a mining claim on the same land in the manner prescribed by law, which was named "Bon Ton," and was valid and subsisting on the 6th of November, 1886. They allege that the White Eagle mining claim was invalid, because one S. E. Williams on the 12th day of March, 1885, segregated and appropriated the land on which it was located, by entering upon and locating thereon a mineral claim known as the "Small Hope" in the manner and form required by law, and that it was in full force when the White Eagle mining claim was located. They aver that, if the Buffalo Zinc & Copper Company acquired any interest or title in and to the lands in controversy by locating the White Eagle and Bell mining claims thereon, it abandoned and forfeited it on the 14th day of February, 1892, by entering and locating thereon a placer mining claim, and by permitting and causing one August Schmidt on the 13th day of April, 1892, to enter the land as a homestead, and to occupy the same for a full period of five years, with the fraudulent intent of acquiring the same, through Schmidt, as agricultural lands. They aver that, if the Buffalo Zinc & Copper Company acquired any interest or title in and to the lands upon which the Bell and White Eagle mining claims are located, it forfeited the same by failing to do the assessment work required by law in such cases for the years 1893, 1894, 1895, 1896, and 1897. They alleged that they peacably entered and located a placer claim upon

the lands in controversy. They allege that the Buffalo Zinc & Copper Company ought not to maintain its action, because it is a foreign corporation, and has not filed in the office of the secretary of state a copy of its charter or articles of incorporation or association, and has not designated an agent, who is a citizen of this state, upon whom summons or other process may be served, and has not filed a certificate with the secretary of state showing its principal place of business in this state. And they asked that their answer be taken and considered as a cross complaint against the Buffalo Zinc & Copper Company, and that they have judgment for the land.

The defendants G. J. Crump, B. J. Carney, J. C. South, M. N. Dyer, Z. M. Horton, and W. F. Pace answered the complaint of the Buffalo Zinc & Copper Company, adopted the answer of Frank, S. J., and Henry as their own, and alleged that on the 28th day of December, 1897, they located a mining claim on the lands in controversy, and called it the "White Eagle Placer Mining Location," and thereupon entered, begun, and carried thereon mining operations, and expended large sums of money in developing the same, and at all times thereafter have continued in possession and expended money and labor upon the same, and on the 16th day of September, 1898, made application to the United States for a patent thereto in the manner and form required by law. And they asked for judgment for the land.

The Buffalo Zinc & Copper Company answered the cross complaint of Frank, S. J., and Henry Pace, and denied all the allegations therein inconsistent with its complaint.

The court, after hearing the evidence adduced by both parties, found that the defendants were entitled to the possession of the land, and that the plaintiff, Buffalo Zinc & Copper Company, was, in equity, entitled to recover the sum of $10,000 for moneys expended by it in developing said property, but refused to determine whether it was lead and lode or placer ground, and rendered a decree in favor of the defend-

ants for the land, and decreed that the plaintiff have a lien on the same for the $10,000, provided it assented to and ratified the decree within 40 days; and the plaintiff appealed.

The following questions are presented by the pleadings and evidence in this case for our consideration and decision:

First. Did appellant, by a failure to comply with the terms of an act entitled "An act to prescribe conditions upon which foreign corporations may do business in this state," approved February 16, 1899 (Acts 1899, p. 18), lose its right to maintain this action?

Second. Was the mining claim of appellant located upon a lead and lode of mineral?

Third. Were the locations of the Bell and White Eagle claims by Rose Ann Kaylor and Francis E. Blake valid?

Fourth. Did appellant abandon or forfeit the Bell and White Eagle lead and lode claims?

Fifth. Did the appellant have the right to amend the Bell and White Eagle claims?

We shall consider these questions in the order stated.

1. Section 1 of the act of February 16, 1899, provides that every foreign corporation,

> "Before it shall be authorized or permitted to transact business in this state, or to continue business therein, if already established, shall by its certificate, under the hand of the president and seal of such company or corporation, file in the office of the secretary of state of this state, designate an agent * * * upon whom service of summons and other process may be made," and state its principal place of business in this state.

Section 2 provides that every foreign corporation doing business in this state shall file in the office of the secretary of state of this state a copy of its charter, articles of incorporation or association, or certificate of incorporation. Section 3 provides that any corporation which shall refuse or fail to comply with the act shall be subject to a fine of not less than $1,000, and shall not

"Maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand whether arising out of contract or tort."

And section 4 provides that

"Any foreign corporation that has heretofore engaged in business, or made contracts in this state, may within ninety days after the passage of this act, file such copy of articles of incorporation, together with certificate of appointment of an agent upon whom service of summons and other legal process may be had, in the office of the secretary of state, and pay the requisite fees thereon, as provided by this act."

This action was commenced in December, 1898, before the act of February 16th was passed; and the plaintiff, a foreign corporation, filed a copy of its articles of incorporation, and a certificate of the appointment of an agent upon whom service of summons and other legal process may be had, in the office of the secretary of state on the 18th of August, 1899, during the pendency of the action.

Appellant contends that it was not necessary to file a copy of its articles of incorporation, or a certificate of appointment of an agent, in order to maintain this action, because it is not a suit or action upon any demand arising out of a contract or tort. But it is not necessary to decide that question. The act of February 16th does not expressly prohibit the institution of an action because of a failure to perform any condition; nor does it intend to forever prohibit the maintenance of any action because the plaintiff therein is a foreign corporation, and has not within any particular time complied with its terms. Penalties are imposed on account of past conduct or omissions. The penalties of the act in question are doubtless intended to compel an observance of its terms. When that is done, its purpose is accomplished; the condition upon which the right to maintain an action depends is performed; and the plaintiff can, in the future, prosecute it to

a final judgment. *Carson-Rand Co.* v. *Stern,* 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420.

The institution and prosecution of an action are not doing business, within the meaning of the act of February 16, 1899, and of other statutes upon the same subject. *St. Louis Ry.* v. *Fire Ass'n.,* 55 Ark. 174, 18 S. W. 43.

The appellant complied with the act, and has the right to prosecute its suit until it is finally disposed of in due course of law.

2. Was the mining claim of appellant located upon a lead and lode of mineral?

It is difficult to define what is meant by a "lead," "lode," or "vein" of mineral matter. The first reported case in which a definition was attempted is the *Eureka Case,* 4 Sawy. 302, 311, Fed. Cas. No. 4,548. The court, after observing that the word was not always used in the same sense in scientific works on geology and mineralogy, and by those actually engaged in the working of mines, said: "It is difficult to give any definition of the term as understood and used in the acts of congress which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode, in the judgment of geologists. But to the practical miner the fissure and its walls are only of importance as indicating the boundaries within which he may look for, and reasonably expect to find, the ore he seeks. A continuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term, as used in the acts of congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rocks." The supreme court of the United States, in *Iron Silver M. Co.* v. *Cheesman,* 116 U. S. 529, 534, 6 Sup. Ct. 481, 483, 29 L. Ed. 712, followed this

citation by observing: "This definition has received repeated commendation in other cases,—especially in *Stevens* v. *Williams,* 1 McCrary, 480, 488, Fed Cas. No. 13,413, where a shorter definition by Judge Hallett, of the Colorado circuit court, is also approved, to wit: 'In general it may be said that a lode or vein is a body of mineral, or mineral body of rock, within defined boundaries, in the general mass of the mountain.' " And the same court in the same case said: "The lode or vein must be continuous, in the sense that it can be traced through the surrounding rocks, though slight interruptions of the mineral-bearing rock would not be alone sufficient to destroy the identity of the vein. Nor would a short, partial closure of the fissure have that effect, if a little further on it recurred again, with mineral-bearing rock within it." *Iron Silver M. Co.* v. *Cheesman, supra.* We accept this interpretation of the acts of congress as correct.

The validity of the location of the Bell and White Eagle mining claims depends upon the acts of congress. They were located under these acts, and derive their whole force, strength, and support from them. In determining, therefore, whether they were located upon a lode or vein of minerals, we are governed by the meaning of those terms as used in the statutes of the United States. It can serve no useful purpose to set forth the evidence adduced by the parties upon this issue. It would require too much time and space to do so. It is sufficient to say that, in our opinion, the preponderance of the evidence in the case shows that the claims in question were located upon a lode or vein of minerals, in the sense those terms are used in the laws enacted by congress; and we so decide.

3. Appellees insist that the locations of the Bell and White Eagle claims, as made by Rose Ann Kaylor and Francis E. Blake, were invalid. They say that the description of the Bell claim in the notice of location by Kaylor was insufficient. It is as follows: "Beginning at the N. W. corner of El Will-

iams, 1-16, at a black oak post; thence 1,500 feet north between Sec. 10 & 11 to a dogwood bush; thence 600 feet E. to a dogwood bush; thence 1,500 feet south to oak post in Williams' field; thence 600 feet to place of beginning. This being in the northwest quarter of the southwest quarter, Sec. 11, T. 17, range 15 W." They base their contention upon the fact that there is nothing in the record which shows what is meant by "El Williams, 1-16," named in the notice as the beginning point. But it does show that it was at a black oak post, and, 1,500 feet north of it was a dogwood bush between sections 10 and 11, which must have been on the line between those sections, and that the claim described was in the N. W. ¼ of the S. W. ¼ of section 11, township 17, range 15 W., in Marion county, in this state. The presumption is that it (El Williams, 1-16) is a well-known natural object, until the contrary appears. *Hammer* v. *Mining Co.* 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964, 16 Morr. Min. Rep. 125, 132. And nothing is shown to the contrary. The sufficiency of the description is not attacked upon any other ground.

What we have said of the Bell claim is equally true of the White Eagle claim.

They further insist that there is no evidence to show that the notices of the location of these claims were posted on them, but the evidence does show that the appellant purchased the Bell and White Eagle claims, and that they were conveyed to it by the vendor, and that it has been in possession, controlling and developing them, and holding adversely to all the world, for a time longer than the statutory period of limitation. As against all adverse claimants, the presumption is that the locations of the claims of appellant were regularly made. *Harris* v. *Mining Co.* (C. C.) 3 McCrary, 14, 8 Fed. 863, 12 Morr. Min. Rep. 178; *Cheesman* v. *Hart* (C. C.) 42 Fed. 99.

They say that the notices of the location of these claims were not recorded within 30 days. The record shows that

they were recorded before any adverse rights to the same ground were acquired. This is sufficient. No damage was done by the failure, and no one can complain that it was not done at an earlier day. *Faxon* v. *Barnard* (C. C.) 2 McCrary, 44, 4 Fed. 702, 9 Morr. Min. Rep. 515; *Preston* v. *Hunter*, 15 C. C. A. 148, 67 Fed. 996; *McGinnis* v. *Egbert*, 8 Colo. 41, 5 Pac. 652, 15 Morr. Min. Rep. 329.

Appellees contend that the original locations of the Bell and White Eagle claims were void, because the land covered thereby was not subject to location at the time they were made; E. C. Bartlett and S. E. Williams having previously, on the 12th of March, 1885, made mining locations, known as the Bon Ton and Small Hope claims, on the same land. The evidence indicates that Bartlett and Williams had abandoned their claims when the Bell and White Eagle claims were located. After locating the Bon Ton and Small Hope claims, they never undertook to develop and maintain them. The Bell and White Eagle claimants took possession, and held and developed them by work and labor performed, and held adverse possession of the same for a longer time than the period of limitation prescribed by statute. This was sufficient to render their claim valid against every one except the United States. *Glacier Mt. M. Co.* v. *Willis*, 127 U. S. 471; *Francoeur* v. *Newhouse* (C. C.) 43 Fed. 236; *420 M. Co.* v. *Bullion M. Co.* 3 Sway. 634, *Fed. Cas.* No. 4,989; *Harris* v. *Mining Co.* (C. C.) 3 McCrary, 14, 8 Fed. 863.

4. Did appellant abandon or forfeit the Bell and White Eagle lead and lode claims?

Appellees alleged that appellant made a placer location upon 160 acres, including the ground upon which the Bell and White Eagle lead and lode claims were located, and thereby abandoned the latter. But this was disproved by the evidence. W. Q. Seawell, as agent, undertook to make such a location, but did so without authority, and appellant refused to ratify it.

The next contention is that appellant abandoned the Bell and White Eagle mining claims by quitting work upon them and closing them up, and causing August Schmidt to enter the land embraced by the same, together with other lands, amounting in the aggregate to 160 acres, as a homestead. An abandonment is a voluntary act, and consists of the relinquishment of possession of the claim, with an intention not to return and occupy it. It is purely a question of intention. "If there is no *animus revertendi,* the desertion of the claim determines the property at once, without regard to the duration of the locator's absence." To constitute an abandonment, there must be an absolute desertion of the premises. The burden of proving it is upon him who asserts it. 2 Lindl. Mines, § 643. In this case the appellant quit work upon its claims temporarily, except annual assessment work, on account of the lack of transportation for the ores taken from the mines. August Schmidt entered the land as a homestead, but without the consent of appellant. There was no agreement or understanding that he would hold the land for its benefit. The evidence is insufficient to prove that it did, or intended to, relinquish its claims.

Appellees allege that appellant forfeited the Bell and White Eagle mining claims by the failure to perform the annual labor required by law. Section 2324 of the Revised Statutes of the United States provides, among other things, as follows:

"On each [mining] claim located after the 10th day of May, 1872, and until patent has issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. But where such claims are held in common, such expenditures may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made: provided, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

Under this statute, if an original locator, his heirs or assigns, should fail to perform work in any year, and should thereafter resume work, in good faith, before any relocation is made, he thereby preserves his right to the claim. His rights then stand as they would if there had been no failure to comply with this condition of the law, and no one has a right to relocate upon the land covered by his claim after such resumption of work in good faith. *Belk* v. *Meagher,* 104 U. S. 279, 26 L. Ed. 735; *North Noonday M. Co.* v. *Orient M. Co.* (C. C.) 1 Fed. 522, 536.

As said in *Belk* v. *Meagher,* 104 U. S. 284, 26 L. Ed. 735: "Mining claims are not open to relocation until the rights of a former locator have come to an end. * * * The right of location upon the mineral lands of the United States is a privilege granted by congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against a prior locator, but the whole world, because the law allows no such thing to be done."

A forfeiture of a mining claim by the failure of the former owner to perform the annual labor required by law cannot be established, except by clear and convincing evidence. The burden of proving it rests upon him who sets it up,—in this case, upon the appellees. *Hammer* v. *Mining Co.* 130 U. S. 291, 301, 32 L. Ed. 964.

The grantors of appellant located their mining claims—the Bell and White Eagle—in the year 1886. They and appellant held and controlled the same until 1897 and 1898, when appellees undertook to locate claims upon the same, and other lands, and to take possession thereof. Saying nothing of the work done by appellant in previous years, we think the evidence satisfactorily shows that it, in good faith,

annually performed the work required by the statutes of the United States in the years 1895, 1896, 1897, and 1898, and until the commencement of this suit. The attempted location of appellees was therefore void, and the effort to take possession was a trespass.

5. Appellant amended the location of its Bell and White Eagle mining claims. Appellees insist in this court that the amendment was not made in the manner prescribed by law. But that was not in issue in the trial court. Appellant alleged in its complaint as follows: "Plaintiff further states that on the 19th day of May, 1898, plaintiff, being the owner of and in possession of all that part of said White Eagle and Bell mining claims that was not embraced in the homestead of August Schmidt, as corrected by the secretary of the interior, made a corrected location of said mining claims, so as to conform to the lead or lode of mineral, and embraced said lands in one claim, containing about seventeen and 60-100 acres, and named the 'White Eagle Lead and Lode Mining Claim,' and situated and embracing most of the south half of the northwest quarter of section 11, township 17 north, of range 15 west; that said amended location was made in conformity to the laws of the United States, the laws of the state of Arkansas, and the laws and usages of the Rush Creek mining district, where said mining claim is located; that said location notice was duly recorded in the office of the Rush Creek mining district on the 9th day of May, 1898, in Record Book K, on pages 44 and 45." And appellees answered as follows: "They deny that plaintiff, Buffalo Zinc & Copper Company, had any right or authority to make the said pretended change and correction of what it claims to be its lode or lead mineral claim. * * * They aver that, as alleged in their original complaint filed herein, which said complaint is here referred to, and asked to be taken and considered in connection with this pleading, that long before said pretended change of survey by said plaintiff, Buffalo

Zinc & Copper Co., these plaintiffs' [defendants'] had, in manner and form required by law, peaceably entered upon and made August placer mineral location, covering all the lands involved in this controversy and all the lands mentioned and described in these plaintiffs' [defendants'] original complaint, and was holding the same at the time the said plaintiff, Buffalo Zinc & Copper Company, entered thereon for the purpose of making said pretended change in what they claimed to be their lead and lode, and aver that said entry by said plaintiff, Buffalo Zinc & Copper Company, was without right or authority of law, and that such entry was a trespass on the rights of these plaintiff's [defendants]." The complaint and answer show that the legality and sufficiency of the amendment of the location were not questioned, except the right of appellant to enter upon the land for the purpose of making the same; and that, we have seen, it could lawfully do. It was unnecessary to prove or show that which was expressly or impliedly admitted by all the parties.

It follows that the mining claims of the appellees, so far as they conflict with that of appellant as amended, should have been canceled by the trial court.

It is therefore ordered that the decree appealed from be reversed, and that this cause be remanded, with instructions to the court to enter a decree in accordance with this opinion.

J. W. EDWARDS ET AL. v. THE IOLA GAS CO.

(65 Kansas 362; 69 Pac. 350. Supreme Court. July 5, 1902.)

[1]**Time of rent payment when not of the essence. Circumstances forbidding forfeiture.** While a stipulation in an oil and gas lease, providing for a forfeiture of the lease for nonpayment of rent reserved, is inserted for the benefit of the lessor, and is to be strictly construed for his benefit and protection, yet, where the time of payment of such rental is neither in express terms nor by necessary implication made of the essence of the lease between the parties, equity may excuse the default in payment, and will not declare a forfeiture and cancellation of the lease in a case where it would be inequitable and unconscionable to so decree.

Findings examined, and found sufficient, in connection with a general finding in favor of the defendant, to excuse a refusal to enter a decree forfeiting the lease in controversy in this action.

[2]**While forfeitures in oil and gas leases are exceptionally favored,** yet it is not a rule of universal application that all defaults by the lessee entitle the landlord to a forfeiture.

Error from District Court, Allen County; L. Stillwell, Judge.

Action by J. W. Edwards and others against the Iola Gas Company. Judgment for defendant, and plaintiffs bring error. *Affirmed.*

[1]*Bliley* v. *Wheeler*, 5 Colo. App. 287; 38 Pac. 603. *Little Rock Co.* v. *Shall*, 59 Ark. 405; 27 S. W. 562. *Plummer* v. *Hillside Co.* 104 Fed. 208. *Marshall* v. *Forest Oil Co.* 21 M. R. 179.

[2]For breach of an implied covenant to develop oil land the remedy is by action at law and not by forfeiture. *Carr* v. *Huntington Co.* 33 Ind. App. 1; 70 N. E. 552.

Grant of oil at an annual rental construed as a perpetual lease terminable at the option of the lessee only. *Central Ohio Co.* v. *Eckert*, 70 Ohio 127; 71 N. E. 281.

In an oil and gas lease there is an implied covenant to develop the premises; but this covenant may be waived by acceptance of an acreage rental. *Venedocia Co.* v. *Robinson*, 71 Ohio 302; 73 N. E. 222.

Argued before DOSTER, C. J., and SMITH and POLLOCK, JJ.

THOMPSON & THOMPSON, for plaintiffs in error.

H. A. EWING, and PERRY D. ROSE, for defendant in error.

POLLOCK, J. This action was brought by plaintiffs in error, plaintiffs below, against the Iola Gas Company, to procure a decree of cancellation of an oil and gas lease upon a tract of land purchased by plaintiffs during the term, and with notice of such lease. The right to the relief demanded is predicated upon two propositions: (1) That defendant company had failed to comply with the requirements of section 12, c. 10, Laws 1898, commanding a report of its affairs to be made to the secretary of state; (2) that defendant had forfeited its right to the property by nonpayment of rent. The lease in question contains the following stipulation:

"In consideration of said grants and demise, the said party of the second part agree to give or pay to the said party of the first part the full equal tenth part of the oil and minerals produced or saved from the premises, and to deliver the same, free of expense, into the tanks or pipe lines to the credit of the first party, and, should gas be found in sufficient quantities to justify marketing the same, the consideration in full to the party of the first part shall be fifty ($50.00) per annum for the gas from each well, so long as it shall be sold therefrom, gas free of cost for household use on the premises; said second party to have gas or oil free of cost for drilling or pumping purposes. It is agreed that there shall be no wells drilled within 300 feet of the buildings now on the premises without the consent of the first party. It is further agreed that the party of the second part shall complete a well on the above-described premises within ninety days from the date hereof, unavoidable delays and accidents excepted, or, in default thereof, to pay to the party of the first part for further delay a yearly rental of twenty dollars on said premises herein leased from the time above specified for completing a well until such well shall be completed. The said rental shall be deposited to the credit of the party of the first part in the bank of Allen county, or be paid in direct to said first party.

And a failure to complete such well, or to make such payments as are herein mentioned, shall render the lease null and void."

A gas well was completed upon the premises in the month of November, 1898. The company commenced marketing gas from this well on the 8th day of December, 1898. It was contended that the company had wholly failed to make payment of the sum of $50, as specified in the lease, at the time of the commencement of this action, which was December 16, 1899, and that therefore, the lease became null and void, and plaintiffs were entitled to a decree of cancellation. The company based its defense upon a waiver by plaintiffs of the right to insist upon the forfeiture claimed; asserted that plaintiffs were estopped, by their acts and conduct, from insisting upon such forfeiture; and alleged the willingness and readiness of defendant at all times to comply fully with the terms of the lease; and the payment of a portion of the amount due to the lessor. There was a trial to the court. Special findings of facts were made at request of plaintiffs and judgment was rendered for defendant. Plaintiffs bring error.

The sole ground of error relied upon to work a reversal of the judgment rendered arises upon the action of the trial court in overruling the motion for a new trial and entering judgment in favor of defendant. What effect the failure of defendant company to comply with the provisions of section 12, c. 10, Laws 1898, would have had upon its right to defend this action, need not be considered, as the court specifically found from the evidence that no such failure was proved. As to the failure of the company to make payment of the sum of $50 per annum for each gas well sunk upon the premises from which gas was marketed, the court found as follows:

"Q. 22. Find what statements and representations, if any, were made by the officers and agents of the defendant company, to induce the said James A. Jeffries to accept the sum of $15 as a payment on the rental for the use of the gas from said well long after said

premises were conveyed to these plaintiffs by deed from him, and after the commencement of this suit. Ans. Said officers and agents, honestly and in good faith, believed that said Jeffries was entitled to said sum; they thereupon tendered the sum to him, and he accepted it.

"Q. 23. Find whether or not the payment of said $15.00 was made in good faith by said officers and agents of the defendant company to discharge the indebtedness actually due—a debt from said defendant company to said Jeffries—or was it paid to him for a shift and device to, if possible, prevent the plaintiffs from recovering in this action? Ans. It was not paid as a shift or device to prevent plaintiffs from recovering in this action. The other portions of this question are answered in No. 22.

"Q. 24. Find whether or not the $50.00 rental for the use of the gas from said well, as provided to be in said lease, for one year from the completion of said well, or the use by the defendant company of said gas from said premises, was paid or offered to be paid to the plaintiffs, or either of them, or to any person for them authorized to receive the same, before the expiration of said year, and before the commencement of this action. Ans. The defendant, by its secretary, met the plaintiff Edwards in the city of Iola a short distance from the defendant's office, and thereupon said defendant, in good faith, through its secretary aforesaid, requested said plaintiff to come to the office of the defendant for the purpose of there being paid all moneys due the plaintiff under the terms of the lease in controversy. The defendant was ready, willing, and able to pay said money, but said plaintiff declined to receive the same for the reason that he considered the lease forfeited. This occurred a few days after December 3, 1899, and before the commencement of this action.

"Q. 25. Find whether or not the offer of the said defendant company through its secretary, if any such offer was ever made, to pay these plaintiffs the said $50.00 after the commencement of this action, was made in good faith, or merely for the purpose of trying to defeat the plaintiffs' recovery in this action. Ans. This is covered by the last preceding answer."

It is earnestly insisted by counsel for plaintiffs in error that the above findings are insufficient to excuse the refusal of the trial court to enter a decree canceling the lease; that oil and gas leases are exceptions to the general rule that forfeitures are not favored by the law; that, unless a strict and literal compliance with the terms of the lease by the lessee is shown, it is the duty of the court to award a decree of cancel-

lation; and *Galey* v. *Kellerman,* 123 Pa. 491, 16 Atl. 474; *Wills* v. *Gas Co.* 130 Pa. 222, 18 Atl. 721, 5 L. R. A. 603; *Hooks* v. *Forst,* 165 Pa. 238, 30 Atl. 846; *Evans* v. *Trust Co.* (Ind. Sup.) 29 N. E. 398, 31 L. R. A. 673; and other cases, —are cited in support of this contention. While it is undoubtedly true that provisions for forfeiture in leases of this character are for the benefit of the lessor, and are more strictly enforced than in the ordinary lease between landlord and tenant, yet it is not a rule of universal application that all defaults made by the lessee entitle the lessor to declare a forfeiture, or have a decree canceling the lease.

The action here brought is equitable. The time of payment specified in the lease is neither in express terms nor by necessary implication of the essence of the contract. In the absence of such stipulation, equity will not decree the cancelation of a contract for the failure of a party to strictly comply with its terms, when it would be unconscionable to so do. While from the very nature of the undertaking, the situation of the parties, the small amount of rent reserved in leases taken for the purpose of development of new territory, the liability of exhaustion of the supply from wells sunk on adjacent property, all conduce to render equitable a more strict compliance with the terms of the lease by the lessee in cases of this character than in ordinary cases of landlord and tenant, yet, as in this case the defendant company had expended a large amount of money in development work, had discovered a paying well upon the property, increasing the amount to be paid under the terms of the lease, and, as the trial court specifically states at the conclusion of his findings, "the above and foregoing answers are only in response to the questions submitted by the plaintiffs, and are not intended to include all the issuable facts in the case," we cannot say, in the face of the general finding for the defendant, and under the findings made at the request of plaintiffs, that the trial court erred in refusing to enter a decree canceling the lease

in question. On the contrary, we are of the opinion that under the circumstances of this case, and upon the facts as found by the trial court from the evidence, the decree entered is in harmony with equity and justice as between the parties, and is supported by the authorities. See *Lynch* v. *Gas Co.*, 165 Pa. 518, 30 Atl. 984; *Steiner* v. *Marks,* 172 Pa. 400, 33 Atl. 695.

It follows that the judgment must be affirmed.

DOSTER, C. J., and SMITH, J., concurring.

A. W. BASH v. THE CASCADE MINING CO.

(29 Washington 50; 69 Pac. 402. Supreme Court. July 5, 1902.)

[1]**The holder of the receiver's receipt for mining claims** duly entered for patent is the owner of the fee and is in position to tender unobjectionable deed upon his contract to deliver "good and sufficient deed in fee simple" for the claims.

Under such contract the parties will be held to have contracted for such title only as the vendor could convey, the vendee going into possession, making improvements and payments, obtaining an extension for making final payment, and offering a bonus for a further extension, all the time knowing the condition of the title, which was perfect, except that no patent had issued.

Appeal from Superior Court, Thurston County; MASON IRWIN, Judge.

Action by A. W. Bash against the Cascade Mining Com-

[1]**After entry and payment the United States holds only the naked** and legal title for the benefit of the purchaser. *Rader* v. *Allen*, 27 Oreg. 344; 41 Pac. 154. *Hamilton* v. *Southern Nevada Co.* 15 M. R. 314. *Benson Co.* v. *Alta Co.* 17 M. R. 488.

A receiver's receipt is admissible in evidence although the application is under suspension for resurvey. *Last Chance Co.* v. *Tyler Co.* 61 Fed. 557.

Where entry has been made but cancelled the receiver's receipt may be defeated by proof of such action. *Murray* v. *Polglase*, 17 Mont. 455; 43 Pac. 505.

Where the receiver's receipt was obtained by fraud, it does not excuse the performance of annual labor. *Murray* v. *Polglase*, 20 M. R. 296.

A receiver's receipt obtained pending disposition of adverse claim suit is void. *Deeney* v. *Mineral Co.* 22 M. R. 47.

A receiver's receipt, uncancelled, is equivalent to a patent so far as the rights of the third parties are concerned. *Aurora Hill Co.* v. *85 M. Co.* 15 M. R. 581.

Receiver's receipt was cancelled by which the entryman was deprived of the overlap or strip to which he was entitled. The cancellation was held void. *Rebecca M. Co.* v. *Bryant*, 31 Colo. 119; 71 Pac. 1110.

pany for the rescission of a contract for the sale of a mining claim. From a judgment for plaintiff, the defendant appeals. *Reversed.*

TROY & FALKNOR, for appellant.

ALLEN WEIR and PRESTON, CARR & GILMAN, for respondent.

MOUNT, J. On September 9, 1884, the Cascade Mining Company was the owner of five mining claims situated in Negro Creek mining district, in Kittitas county, Wash., and at that time made application to the proper land office for United States patents thereto, paid the purchase price required by law, and obtained the ordinary certificates of purchase. Thereafter, on the 2d day of July, 1891, the Cascade Mining Company entered into a contract with A. W. Bash to sell and convey all the five claims mentioned to Mr. Bash for the sum of $20,000; $1,000 to be paid in cash, $4,000 in six months, and $15,000 in one year, with interest on deferred payments at the rate of 8 per cent per annum; and that, upon the final payment being made, the Cascade Mining Company should convey, "by good and sufficient deed in fee simple," the property described. Subsequently, on March 1, 1892, the time for making the $4,000 payment was extended to September 1, 1892, and the time for making the $15,000 payment was extended to the 2d day of January, 1893. The contract further provided that Mr. Bash should have possession of the property with privilege to improve the same, and that, in case the payments were not made when due, then all payments theretofore made should be forfeited to the Cascade Mining Company. Mr. Bash went into possession of the property under the contract, and the first and second payments were made as agreed upon. When the last payment became due, on January 2, 1893, it was not paid. On the

following day, the Cascade Mining Company, by a resolution, declared a forfeiture of the contract. There is some dispute in the evidence as to whether, or not, after this forfeiture had been declared, an extension of time for three days was given to Mr. Bash to make the last payment. This point, however, becomes immaterial, for the reason that on the 5th day of January, 1893, Mr. Bash made a tender of the balance due under the contract, and demanded a deed in fee simple. Thereupon, the Cascade Mining Company agreed to accept the money, and offered to make Mr. Bash a warranty deed for all the property. Mr. Bash refused to take this deed for the reason that patents had not been issued by the United States to the Cascade Mining Company. He thereupon took his money, and went away. Subsequently, an action was brought by Mr. Bash in the superior court of Thurston county, against the Cascade Mining Company, for a rescission of the contract, for the return of the money paid thereunder, and for damages. Upon a trial by the court, a jury being waived, findings were made, and judgment entered, in favor of the plaintiff, for the money paid under the contract and expended on the mine, amounting, with interest, to the sum of $10,808.33. This appeal is prosecuted by the defendant below from the judgment so entered.

A large number of errors are predicated upon rulings of the court in the admission of evidence and on the findings of fact made by the court. The facts above set out are undisputed in the evidence, and it will be unnecessary to discuss the many errors assigned, for the reason that the one hereafter discussed disposes of the case upon the merits. The proof shows conclusively that the Cascade Mining Company had paid the purchase price of the mining claims mentioned, and had receiver's certificates therefor from the proper land office; that, at the time of the tender, on January 5, 1893, patents had not been issued by the United States; that these patents were subsequently issued; that the Cascade Mining

Company did not refuse to make deeds, but that respondent, Bash, refused to accept deeds without the patent being exhibited and delivered to him; that the contract provided that the Cascade Mining Company should, upon the payments being made, convey to Bash, by good and sufficient deed in fee simple, the property described. There was no claim or evidence of any character tending to show that the receiver's certificates were obtained fraudulently, or that there were any liens or incumbrances of any kind against the property; and at the time the tender was made there was no claim that the Cascade Mining Company was not the owner of the property; but the conveyance was refused by Bash simply upon the ground that patents had not issued. The sole question in the case, therefore, is, can the plaintiff rescind his contract simply because patents for the mining claims named had not issued to the appellant at the time the tender was made?

In *Carroll* v. *Safford,* 3 How. 441, 11 L. Ed. 671, it was held that after the price of government land had been paid, and the purchaser held the receiver's certificate therefor, the land was subject to taxation, although the patent was not then issued. The court there said:

"Lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are considered, they are protected under the patent certificate as fully as under the patent. * * * The government, until the patent shall issue, holds the mere legal title for the land, in trust for the purchaser."

Witherspoon v. *Duncan,* 4 Wall. 210, 18 L. Ed. 339; *French* v. *Spencer* 21 How. 228, 16 L. Ed. 97; *Stark* v. *Starr,* 6 Wall. 402, 18 L. Ed. 925; *Wirth* v. *Branson,* 98 U. S. 118; *Simmons* v. *Wagner,* 101 U. S. 260; *Deffeback* v. *Hawke,* 115 U. S. 392, 29 L. Ed. 423; *Benson M. & S. Co.* v. *Alta M. & S. Co.* 145 U. S. 428. In *Stark* v. *Starr, supra,* it was said:

"The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued."

In *Deffeback* v. *Hawke, supra,* the court held that the same rule applied to mineral lands as applied to cash and donation entries of agricultural lands; and in *Benson M. & S. Co.* v. *Alta M. & S. Co., supra,* where a receiver's receipt had been issued for mineral lands, the court, after reviewing the decisions of the secretary of the interior and the cases above cited, said:

"There is no conflict in the rulings of this court upon the question. With one voice they affirm that, when the right to a patent exists, the full equitable title has passed to the purchaser, with all the benefits, immunities, and burdens of ownership, and that no third party can acquire from the government interests as against him."

It follows that the Cascade Mining Company, at the time it purchased the property from the United States and paid therefor, and received the proper receiver's certificates, was the fee-simple owner of the estate. These certificates stood in place of the patents, and could be set aside only for the same reason, and in the same way, and in the same forum, that patents could be set aside. *Wilson* v. *Fine* (C. C.) 40 Fed. 52, 5 L. R. A. 141; *Cornelius* v. *Kessel,* 128 U. S. 456, 9 Sup. Ct. 122, 32 L. Ed. 482. That the patents were not issued at once was because of the magnitude of business in the land department. But such delay in the mere administration of the affairs of the land department does not lessen the title of the purchaser in the lands purchased. The estate was vested upon the issuance of the certificates of purchase, and a deed would convey the fee as well before patent issued as after. There was no claim that there were any defects in the title of the property; no pretense of any liens or incumbrances. The purchaser was in possession. We are, therefore, of the opinion that the respondent was not justified

in refusing to take the deeds when offered, and that he could not rescind the contract and recover back the money paid.

The cause will be reversed, with instructions to the lower court to dismiss the action.

REAVIS, C. J., and ANDERS, FULLERTON, and HADLEY, JJ., concur.

DUNBAR, J., dissents.

On rehearing.*

MOUNT, J. The reason for the opinion heretofore filed herein July 5, 1902, is probably not as clearly stated as it ought to be. The case turns on the contract to convey. This contract provides that upon the final payment the vendor shall convey the property described "by good and sufficient deed in fee simple." The meaning of this phrase, as intended by the parties, is the gist of the action. Ordinarily, when a person sells and agrees to convey lands to another by good and sufficient deed in fee simple, and when there are no circumstances to take the case out of the general rule, these words are held to mean a perfect title, both legal and equitable. Rawle, Cov. (5th Ed.) § 32; *Powell* v. *Conant,* 33 Mich. 396; *Moore* v. *Williams,* 115 N. Y. 586, 22 N. E. 233, 5 L. R. A. 654, 12 Am. St. Rep. 844; *Younie* v. *Walrod,* 104 Iowa, 475, 73 N. W. 1021; *Easton* v. *Montgomery,* 90 Cal. 309, 27 Pac. 280, 25 Am. St. Rep. 123. But where, as in this case, the vendee has notice and knowledge of the condition of the title, knows that the title is perfect in the vendor with the exception of the issuance of the patent, goes into possession of the property and makes improvements thereon, makes payments, asks for and is given an extension of time in which to make his final payment, and, when this extension

*Reported in 70 Pac. 487.

has expired, asks for and offers a bonus of $500 for further extension, when he knows patents have not issued, and that his time for payment has expired, such facts show clearly that the parties themselves not only intended that the contract to convey by good and sufficient deed in fee simple meant such title as the vendor could convey, and that the vendee was to rely upon the covenants contained in the deed to indemnify himself against loss by reason of the non-issuance of the patent, but also that the parties themselves so construed it by their subsequent acts and conduct. 1 Warv. Vend. § 24; *Godding* v. *Decker,* 3 Colo. App. 206, 32 Pac. 832; *Rader* v. *Neal,* 13 W. Va. 373; *Younie* v. *Walrod, supra.*

It is insisted in the petition for rehearing that appellant made no offer to convey the property to respondent at the time the tender was made. We have carefully examined the evidence with reference to this point, and find there is practically no dispute upon it. The respondent himself testified that at a meeting of the appellant company, called for the purpose of considering his tender, a quit-claim deed was offered him, and that "they would take the money in escrow until they could perfect the title and deliver me patents." R. W. Emmons, representing a large interest in appellant company, and a witness for respondent, testified substantially that at this meeting they offered to give respondent a regular deed, a quit-claim deed, a warranty deed, "or any kind of a deed he wanted." T. M. Reed, president of appellant company, and a witness for respondent, testified substantially to the same effect.

Petition for rehearing denied.

REAVIS C. J., and WHITE, HADLEY, FULLERTON, and ANDERS, JJ., concur.

PENNSYLVANIA CONSOLIDATED MINING CO. v. GRASS VALLEY EXPLORATION CO.
GRASS VALLEY EXPLORATION CO. v. PENNSYLVANIA CONSOLIDATED MINING CO.

(117 Federal 509. Circuit Court. N. Dist. California. July 28, 1902.)

Proof of 2,800 feet of continuous vein. Evidence considered, and *held* to establish the existence of a vein or lode apexing within the surface boundaries of a mining claim, and having continuity lengthwise of the claim to the extent and in the direction necessary to carry extralateral rights therein between the extended end line planes of the claim, and also to show the continuity and persistence of such vein, in its dip or downward course, extending to the lowest point to which the workings had been carried.

[1]**Continuity not destroyed by complications or spurs.** In a lode or vein having its apex in the surface of a mining claim and a westward dip, after it was followed down several hundred feet, and beyond the side line planes of the claim, through which distance it was a comparatively simple fissure vein, there occurred at some points what were technically termed "complications." The fissure would flatten and pinch out, but before reaching that point there would fall from it a series of small mineralized fissures having an eastward dip, and connecting, at a depth downward of six or eight feet, with another underlapping west dip fissure. This latter pinched out in a short distance on its upward course, but on its downward course it strengthened, and became again a strong ore-bearing vein. Wherever these complications occurred, the miners, in the practical working of the mine, dropped to the underlapping fissure, and followed it as the continuation of the main vein in its downward course. The east dip fissures did not appear to cut

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[1] *Raisbeck* v. *Anthony*, 17 M. R. 148. *Cheesman* v. *Shreeve*, 17 M. R. 260.

In a trespass case defendant attempted to show that the entire surface area was one broad lode. The court treated the location as made on a narrow vein within an area impregnated from true veins and held that a defined lode dipping underneath had apex rights. *Golden* v. *Murphy*, 27 Nev. 379; 75 Pac. 625.

Blanket veins must be located upon as lode claims, not as placers. *Iron S. Co.* v. *Campbell*, 17 Colo. 274; 29 Pac. 515.

Defendant located a lode claim upon a large outcrop of white

across either of those having a west dip, but merely connected them. At other points both north and south of the places where these complications occurred the vein was continuous and unbroken down to the lowest level of the workings. *Held*, that such complications did not break the continuity of the vein, the overlapping and underlapping fissures being portions of the same vein, and that the owner of the claim in which it apexed was entitled to follow it beyond them.

The finding of old stopes in parts of the mine worked at an early date is most thorough proof of the continuity of the vein at such points.

Action in Ejectment and Cross-Action in Trespass. Tried together by the court without a jury by stipulation.

LINDLEY & EICKHOFF, FRED SEARLS, and C. W. KITTS, for Pennsylvania Consol. Min. Co.

GARBER, CRESWELL & GARBER, and A. A. MOORE (P. F. SIMONDS, of counsel), for Grass Valley Exploration Co.

MORROW, Circuit Judge. The first-named action is in trespass, and was instituted in the superior court of Nevada county of this state on August 6, 1900, by the Pennsylvania Consolidated Mining Company, a corporation organized and existing under the laws of the state of California, against the Grass Valley Exploration Company, a corporation organized and existing under the laws of the state of West Virginia, to recover the value of ore extracted by the Grass Valley Exploration Company from certain underground workings alleged by the Pennsylvania Company to be in and

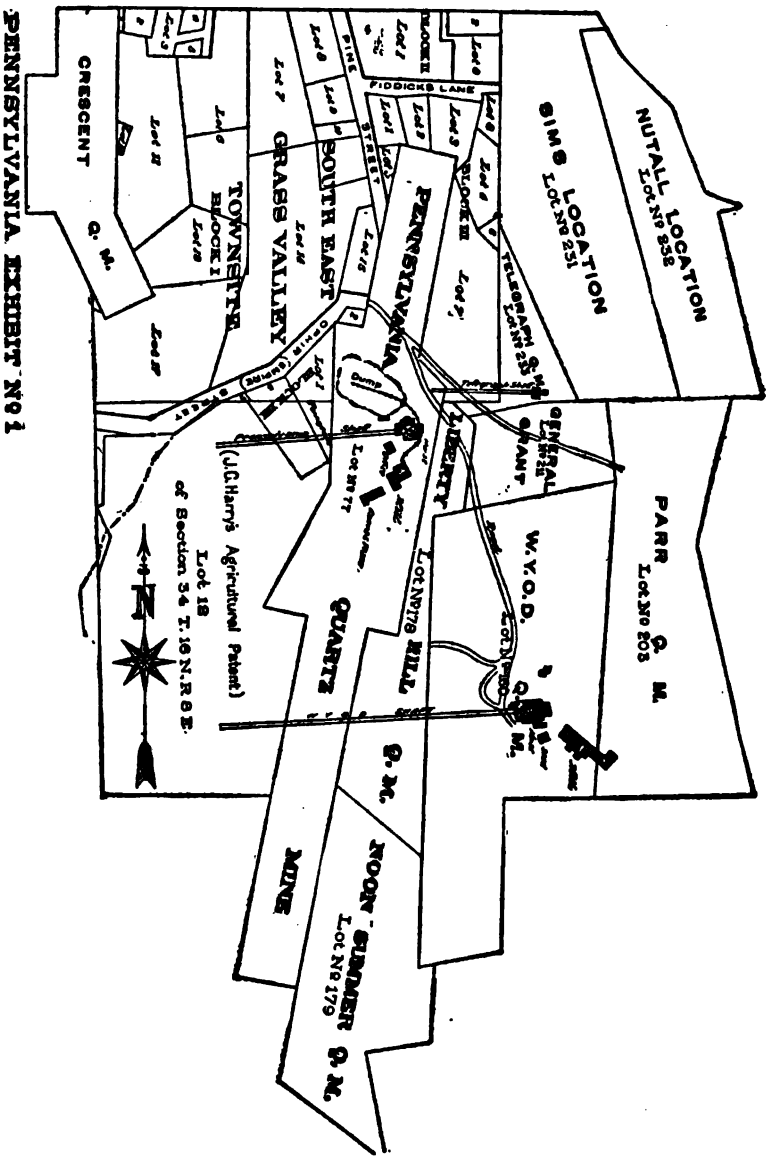
quartz showing by assay a trace of gold and silver and valuable otherwise for the silica. Later plaintiff covered the same ground by a placer location. *Held*, that the burden was on plaintiff to show that the lode location was not a valid claim and there being no proof to that effect the court gave judgment for the defendant. *Bevis v. Markland*, 130 Fed. 226.

Where the lode has no defined walls the presence of the ore bodies is the guide to follow. *Bunker Hill Co. v. Empire S. Co.* 134 Fed. 268.

upon the Pennsylvania quartz vein or lode. The case was transferred to this court upon the petition of the defendant showing that the matter and amount in dispute in the cause exceeds $2,000, exclusive of interest and costs, and that the controversy is between citizens of different states. The second-named action is in ejectment, and was commenced in this court by the Grass Valley Exploration Company on February 16, 1900, against the Pennsylvania Consolidated Mining Company, to recover possession of the quartz vein or lode described in the first action, and embraced within the Pennsylvania underground works underneath the surface properties belonging to the Grass Valley Exploration Company. By stipulation the two cases were tried together by the court without the intervention of a jury. By further stipulation, dated April 17, 1901, it was agreed between the parties to the actions that until the court should have tried the issues as to the title, ownership, and right of possession, neither party should be called upon to offer or introduce evidence as to any damage which they or either of them might have sustained by reason of the alleged wrongful acts of the other; and that when the court should announce its decision upon said issues, and should determine what, as matter of law, were the respective rights of the parties in and to the properties in controversy, and should determine by said decree the ownership of the portions of said properties in dispute, the causes should be referred to a referee or commissioner to be designated by the court, for the purpose of taking testimony upon the question of damages to which the respective parties might be entitled. It was further agreed that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000. In referring hereafter to the parties to these actions, the Pennsylvania Consolidated Mining Company will be designated as the "Pennsylvania Company," and the Grass Valley Exploration Company as the "Grass Valley Company."

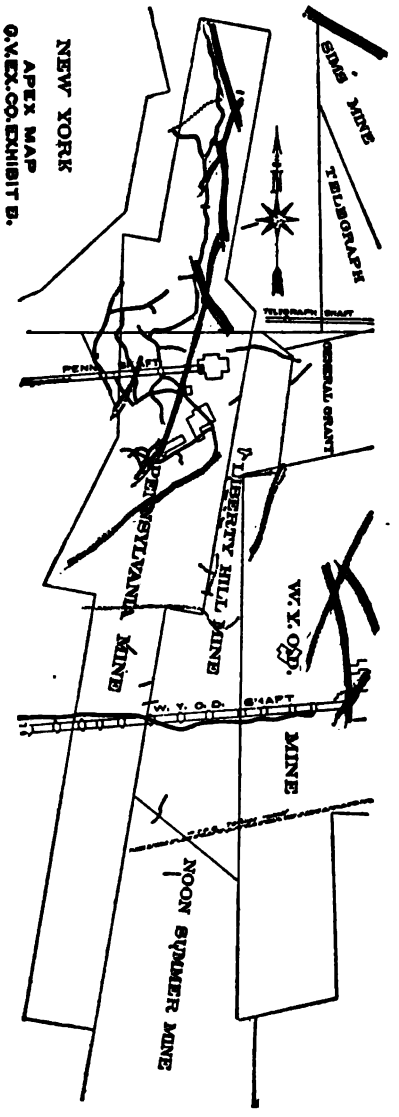
The mining ground in controversy in these two actions is located in Grass Valley, in this state. The Pennsylvania Company claims the right to carry on the mining operations in which it is engaged underneath certain surface rights owned by the Grass Valley Company upon the alleged fact that all of its underground workings were made in the orderly pursuit of mining operations in developing, following, and extracting ore from a vein or lode the apex of which is within the surface boundary of the claims of the Pennsylvania Company; that such vein or lode is continuous and persistent from its apex at the surface, within the boundary of the claims of the Pennsylvania Company, to the lowest workings in the mine; and, by reason of this fact, that the title to the claim or lode is in the Pennsylvania Company. The surface boundaries of the properties owned by the parties to these actions are shown by the annexed diagram.

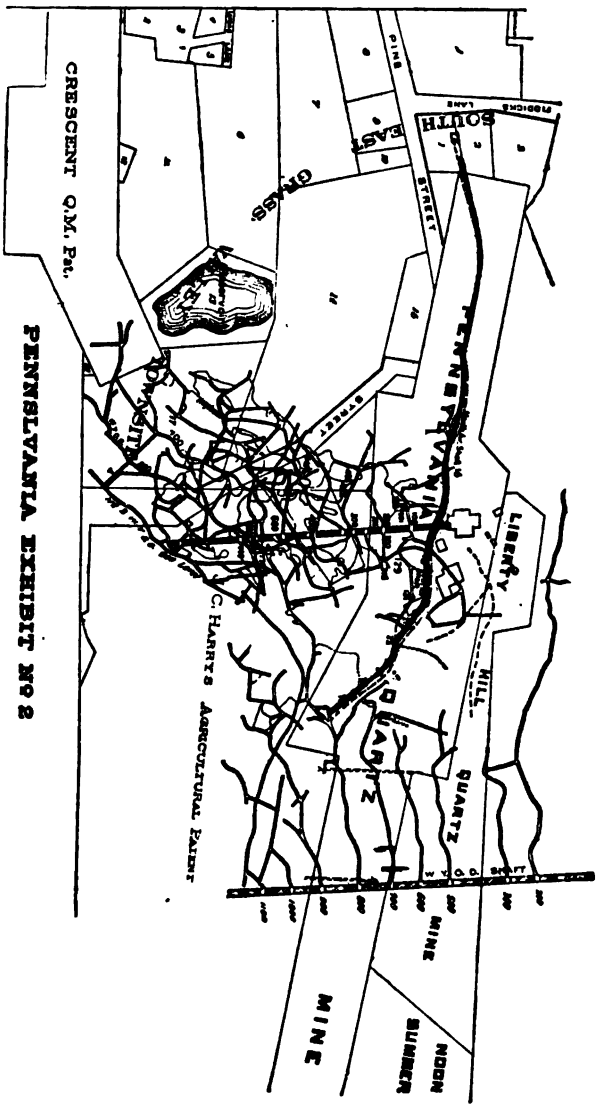
The claims designated on the diagram as the "Pennsylvania," "Liberty Hill," and "Noon Summer," belong to the Pennsylvania Company. The title of the company to the Pennsylvania claim is derived from the United States by a patent dated December 16, 1879, based upon three mining locations, the earliest of which appears to have been made on August 10, 1870. The Pennsylvania Company is also in possession of the Liberty Hill and Noon Summer mining claims under a contract existing at the time of the commencement of these actions to purchase from parties who derive their title from the United States under a patent dated February 6, 1892. The mining claims designated on the diagram as the "W. Y. O. D.," "Parr," "Grant," "Telegraph," "Sims," "Nutall," and "Crescent" belong to the Grass Valley Company. This company is also the owner of the tract designated as the "J. C. Harry Agricultural Patent," to the west of the Pennsylvania claim. It is also the owner of a number of town-site lots in Southeast Grass Valley and the land underlying Empire street, as shown upon the diagram.


NUTALL LOCATION
Lot No 232
SIMS LOCATION
Lot No 231
PARR
Lot No 203
FIDDICKS LANE
BLOCK II
BLOCK III
PINE STREET
SOUTH EAST
GRASS VALLEY
TOWNSITE
BLOCK I
CRESCENT
PENNSYLVANIA
LIBERTY
GENERAL GRANT
W.Y.O.D.
QUARTZ
LOCKWOOD HILL
MINE
NOON-SUMMER
(J.C. Harry's Agricultural Patent)
Lot 18
of Section 34 T. 16 N. R 8 E.
PENNSYLVANIA EXHIBIT No 1

The title of the Grass Valley Company to the claim designated as the "W. Y. O. D." is derived from the United States by a patent dated February 6, 1893, based upon a mining location dated January 2, 1875. The title of this company to the claim designated on the diagram as the "J. C. Harry Agricultural Patent" is also derived from the United States through a homestead patent issued June 4, 1894, based upon a final homestead entry made by Harry on May 20, 1890. This entry was in turn based upon a settlement on the land made by Harry in 1882. The title of this company to the claim designated on the diagram as the "Crescent" is derived from the United States by a patent dated March 8, 1876, based upon a mining location made on the 21st day of August, 1860. For the purpose of this opinion, the title to the remaining claims, lots, and rights owned by this company need not be here further identified or described. It will be sufficient to say that the location of the Pennsylvania claim holds priority over all the claims, lots, and rights shown on the diagram except the Crescent, and that substantially the claims, lots, and rights of the Grass Valley Company surround the claims of the Pennsylvania Company on all sides.

In determining the rights of the parties to the underground veins and lodes in controversy, we shall have to deal mainly with the surface location of the Pennsylvania claim and its underground or extralateral rights. That claim is described in the patent as being "twenty-eight hundred and thirty-eight (2,838) linear feet of the said Pennsylvania quartz mine, vein, lode, ledge, or deposit." The direction of the length of the claim or location containing this vein or lode is described as N., 10° 45′ E., and correspondingly in the reverse direction as S., 10° 45′ W. The end lines of the location across the vein or lode are parallel, having a common direction of N., 79° 15′ W., or correspondingly in the reverse direction S., 79° 15′ E. The surface area of the location is 16.44 acres. The extralateral rights of the veins or


NEW YORK
APEX MAP
G.V.EX.CO. EXHIBIT B.
SIMS MINE
TELEGRAPH
GENERAL GRANT
GIBRALTAR MINE
LIBERTY HILL MINE
W. Y. CO.
W. Y. CO. SHAFT
MINE
NOON SPIDER MINE


PENNSYLVANIA EXHIBIT Nº 2
CRESCENT Q.M. Pt.
GRASS
EAST
SOUTH
STREET
PINE
PENNSYLVANIA
LIBERTY
HILL
QUARTZ
C. HARRY'S AGRICULTURAL PATENT
MINE
SUMNER
NOON

lodes of this location under section 2322 of the Revised Statutes of the United States are described as "for the length hereinbefore described, throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges, or deposits throughout their entire depth, the top or apex of which lies inside the exterior lines of said survey at the surface, extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey." The survey referred to in this description is the survey made by or under the direction of the United States surveyor general, in accordance with the requirements of section 2325 of the Revised Statutes of the United States.

The questions presented for determination are mainly of fact, and relate: First, to the existence of a vein or lode apexing within the surface boundaries of the mining claims owned by the Pennsylvania Company; second, the continuity of the apex of such vein or lode to the extent and in the direction necessary to embrace within extended end line planes the vein or lode in controversy; third, the continuity and persistence of such vein or lode on its dip or downward course from its apex to the lowest point of the vein or lode as developed or worked by either party, and including the ore deposits in dispute.

The existence of a vein or lode apexing within the surface boundaries of the mining claims owned by the Pennsylvania Company is not denied by the Grass Valley Company. The controversy commences with the question as to the continuity of such vein or lode dipping to the west to the extent and in the direction necessary to embrace within extended end-line planes the vein or lode in controversy outside the west side line of the Pennsylvania claim. The Pennsylvania Company claims that it has a vein apexing at or near the surface, and within the boundaries of the Pennsylvania claim, dip-

ping to the west, substantially to the extent and in the direction along the length of the claim as shown by the red line in the annexed diagram. [See diagram entitled "Pennsylvania Exhibit No. 2," printed in colors.]

The Grass Valley Company contends that the Pennsylvania Company never had an apex vein running continuously or approximately so lengthwise within its location across either end line; that it never had an apex vein that did not cross both side lines of the location; that the so-called apex vein, where it did exist, was made up of a series of apexes of veins whose projections would cross the side lines of the Pennsylvania claim. The contention of the Grass Valley Company is illustrated by the annexed diagram. [See diagram entitled "Apex Map G. V. Ex. Co. Exhibit B," printed in colors.]

The Pennsylvania quartz claim appears to have been discovered by John Cadden at or prior to August 10, 1870, when the first location was made by him. This location, together with two others, one north and the other south of the original discovery claim, were incorporated into the Pennsylvania quartz claim, for which a patent was issued by the United States to the Pennsylvania Company on December 16, 1879, for 2,838 linear feet. The north end of the claim for a distance of 627 feet south from the north end line and the south end of the claim for a distance of 1,221 feet north from the south end line is 198 feet wide. The middle section of the claim, 990 feet in length, is 320 feet wide at its narrowest point, and 445 feet at its widest point. The surface opening of the present working shaft of the Pennsylvania Company is approximately 1,000 feet south from the north end line of the claim. The shaft descends into the earth following substantially the dip of the vein at an incline of about 30° to the west. The point of discovery and the first work of any consequence done upon the vein was at a point about 100 feet north of the present shaft. This work was along the vein

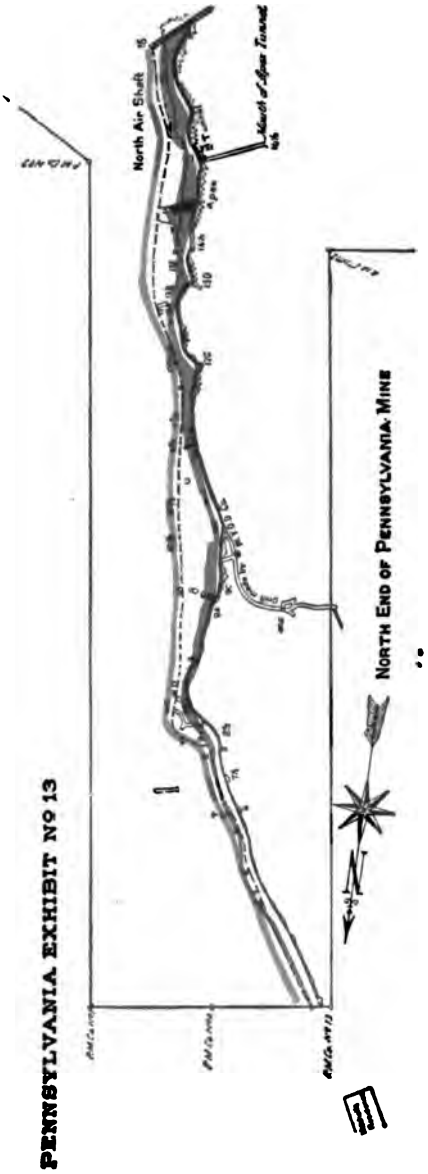
for a distance of about 200 feet north, the vein dipping to the west. The shaft of the Grass Valley Company is located in the W. Y. O. D. claim, patented February 6, 1893. This claim is east of the Pennsylvania claim, and is approximately 1,500 feet in length, running nearly north and south along the W. Y. O. D. quartz vein or lode, and contains 16.24 acres. The elevation of the collar of the Pennsylvania shaft is 2,550.39 feet, and that of the Grass Valley shaft 2,545 feet, above sea level. The bearing of the collar of the Pennsylvania shaft from the collar of the Grass Valley shaft is N., 22° 45′ W., and the distance between the two shafts at the surface is 1,005 feet. James Burke, a witness called on behalf of the Grass Valley Company, testified upon the trial that he had known the Pennsylvania location since 1871, and had worked from the surface down to the 300-foot level. He testified that the vein had croppings on the surface, that these croppings were exposed for a distance of from 15 to 20 feet, and that the direction of this apex vein was supposed to be north and south. He also testified that a shaft was run by Cadden about 100 feet north of the present incline shaft of the Pennsylvania Company. Recent explorations by the Pennsylvania Company north of the shaft and in the direction of the north end line of the claim have disclosed continuous old workings near the surface, commencing at a point about 100 feet north of the present shaft, and running thence northerly for a distance of about 200 feet, indicating the existence of a vein at one time apexing at or near the surface, and conforming substantially to the line between the point marked "14 A" and a point about 50 feet south of the point marked "17," as shown by the Pennsylvania Exhibit No. 13. [See diagram printed in colors.]

These recent explorations by the Pennsylvania Company have also been extended in a northerly direction by cuts and shafts at intervals following the strike of the vein running a little west of north to the north end line of the claim, where

the vein passes out of the claim on its strike a little west of north. At several points in these explorations old workings upon the vein were encountered, indicating that at an early date this vein had been found and explored near the surface. These old workings, together with those first named, extended along about 40 per cent of the explored distance. The vein thus exposed has a general strike in a northerly direction and a dip to the west. Returning to the point about 100 feet north of the shaft of the Pennsylvania Company, and proceeding south in front of or to the west of the Pennsylvania Company's hoisting works, we find no surface explorations of a recent date until we reach a point about 80 feet south of the shaft, where we find what is called the "south air shaft." For this distance of about 180 feet the Pennsylvania Company has endeavored to establish the continuity of the apex vein by showing the existence of old stopes and drifts upon the vein underground running north and south.

Ross E. Browne, an expert mining engineer, called by the Pennsylvania Company, testified that he was employed by that company in March, 1900, to make an investigation and direct exploration work at the mine. He had been employed off and on for a little over a year, and had expended probably 90 days on the ground. After testifying that he had by such work traced the Pennsylvania vein from the northerly end line of the claim at point No. 1 to point No. 16, as shown on the map "Pennsylvania Exhibit No. 13," he testified as follows, referring to "Pennsylvania Exhibit No. 2":

"From point 16, which then becomes a point of the Pennsylvania apex, on to the south, I was unable to do any work conveniently on the surface for the purpose of establishing the apex, owing to the fact that that ground is covered by old dumps, and is mostly made ground. The original ground is not there near to the surface, but by going from point 16 down the north air shaft towards the 100 level we encounter in a short distance the apex of the vein at a point between 16 and 17. I thence follow old stopes down this shaft for a considerable distance. Then pass through a short space of ground



PENNSYLVANIA EXHIBIT No 13

in place, showing the vein in place, with considerable quartz in it. Thence again along the edge of old stopes all the way down to the 100-foot level. From the 100-foot level, a point that we strike the 100-foot level going to the south, we follow continuous vein, partly stoped, practically all the way to the Pennsylvania shaft. At a point opposite to the east crosscut, which is shown on the model, and is marked 'Station 111,' I passed downward through the old stopes, along the edge of the old stopes [referring to stations marked on model Pennsylvania Co. Exhibit No. 4], through 201, 202, 203, to 204, on the 200 level, following the vein all the way; from 204 to the south, passing through the shaft, follow the vein all the way, to 216. From 216 the vein is followed by the south air shaft all the way out to the surface at Station 18. Station 18 then makes a second point of the apex, and from station 16 to station 18 the apex is constructive. Mr. Lindley: Q. That is, at the surface? A. At the surface. That shows—this tracing that I made down the north air shaft through the 200 level to the south and up the south air shaft—shows that the point 18 is a point of the apex of the same individual vein that the point 16 represents. Q. In other words, instead of tracing on the surface, on account of the existence of artificial ground and the dumps, you passed underneath the surface, and followed around the 100 level to the south air shaft, and thence to the surface again in 18? A. Yes, sir. I did not make the tracing on the 100, because there is a small gap in it, but I went down to the 200 to make the tracings, so as to leave no gap in the continuity of the vein development."

The surface having been worked out many years ago, and the ground covered by dumps of rock and other refuse accumulations usual in the vicinity of hoisting works, it was clearly impracticable in the recent explorations to establish the apex of the vein as a physical fact upon the surface along the line between the points mentioned. It was, however, unnecessary. The underground stoping between the 100 and 300 foot levels running north and south furnishes satisfactory, and, indeed, the best, evidence of the existence of a vein reaching near the surface of the line of the projected apex. From the south air shaft further explorations south were continued by Mr. Browne underground. He says:

"Now from the point 129 on the 100 level [referring to station marked on model Pennsylvania Co. Exhibit No. 4], extending to the

south from point 18, the tracing on the surface cannot be made, owing again to artificial ground; that is, the original ground in place has been covered over by old dumps, so that the tracing cannot be well made. There are buildings there as well, the foundations of which cannot be interfered with. Consequently, attempting to follow the vein or establish approximately the apex of the vein from that point to the south, I followed the 100 level to the south from station 129, through station 130, to a point marked on the surface map (Pennsylvania Exhibit 3) about 30 or 40 feet south of station 20. There is no number there. Q. On Exhibit No. 3? A. On Exhibit No. 3. That is as far south as I traced the vein continuously. Mr. Moore: Q. What is that number? A. That number is not given. It is a point immediately east of the sand plant, and about 30 or 40 feet south of station 131 on Exhibit No. 3."

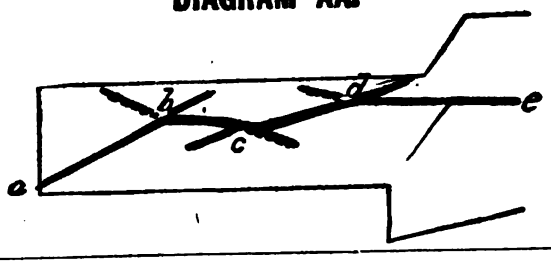
The distance underground was about 150 feet, establishing a projected apex upon the surface for the same distance. From the end of this projected apex upon the surface Mr. Browne traced a vein on the surface from point 21 through 22, 23, 25, 27, 28, and 29, by means of shallow pits and open cuts showing a fairly good vein, which he assumed was the Pennsylvania vein. The distance on the surface from point 21 to 29 is about 300 feet. This apex vein as thus traced has a length of about 1,450 feet, 1,120 feet traced upon the surface and 330 feet traced under ground, all within the boundaries of the Pennsylvania claim, running in a direction corresponding generally to the length of the claim. The Grass Valley Company contends that no such continuous vein apexing within the boundary of the Pennsylvania claim has been found, but that what has been found may be termed a series of intersecting veins, which may be approximately illustrated by the annexed diagram. [See "Diagram AA," printed in colors.]

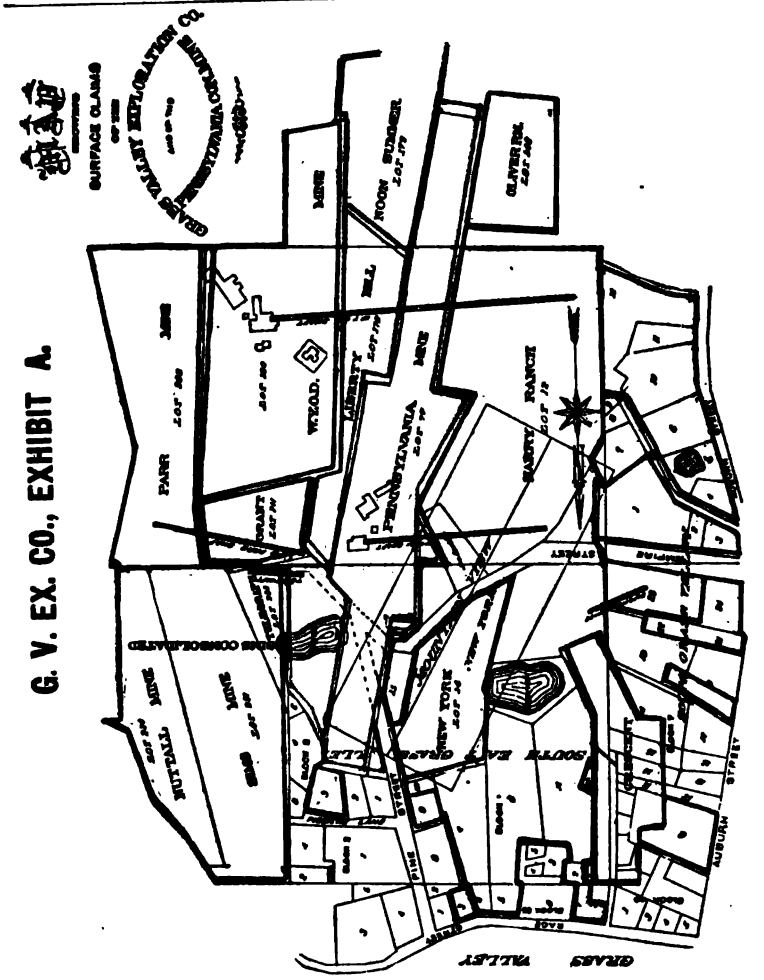
If this contention of the Grass Valley Company is correct, then the Pennsylvania Company has no extralateral right to the ore deposit in controversy to the west of the Pennsylvania west side line, but the same belongs to the Grass Valley Company under its common-law right to everything beneath the

surface covered by its agricultural patent granted to Harry. The claim of the Pennsylvania Company to this extralateral right does not appear to have been questioned until the year 1900, when the underground works of the Pennsylvania Company had been extended some distance beyond the west side line of the Pennsylvania claim and under the Harry ranch. But even in this aspect of the case the burden rests upon the Pennsylvania Company to establish its right to the vein under the surface of the adjoining proprietor. The history of this controversy between these two companies was told upon the trial by W. S. Keyes, the well-known mining engineer. After giving an account of his different employments and experiences as a mining man, mining engineer, and mining manager, he said:

"I am also at present consulting engineer and a director in the Grass Valley Exploration Company. Some year and a half ago, or I think a year ago February, or something like that, we came to the conclusion that the Pennsylvania Company were trenching upon our premises, and we started a suit. When I first was employed as consulting engineer for this company, I made a study of the underground formation. I arrived there in the early days of the month of December, 1898. I spent some two weeks there in a careful study of the maps and underground works of the company, as careful as was possible in that time, and discovered that our principal fissures were making off to the northwest. We were already outside of our territory. I was perfectly well aware that, if projected up in their own directions, the principal fissures, after leaving the W. Y. O. D. proper, would certainly, some of them, go across our side lines, if projected in their own directions. I, therefore, advised my fellow directors to buy up all the surrounding territory. It took much time and money to acquire the property which you now see there outlined to the west in blue. We were in mortal terror that the Pennsylvania Company would find out what we were about,—would suspect that we were afraid that our mine was going outside of our limits, which it would certainly do if our principal fissures would continue in the same direction. Mr. Moore: Q. What properties do you refer to? A. All these surrounded by blue there, the exterior limits of which are marked on the map Exhibit A. [See diagram entitled "G. V. Ex. Co. Exhibit A," printed in colors.] You will observe that there is a large space in the middle, which is the

DIAGRAM AA.





Harry ranch. You will observe that both shafts,—the bottom of both shafts,—are beneath that surface. We bought that Harry ranch. After we had bought it, we found out to our dismay that the owner of the ranch had already sold the mineral rights, so we had to go and buy it over again. We then gradually purchased the Crescent, and the New York, and various mineral rights underneath the surface, as indicated upon the map Exhibit A. After we acquired sufficient property to the west, I advised my fellow associates that it was time to begin with the Pennsylvania, and we began. We have worked upon these developments from that time continuously ever since. At the time of the inauguration of this litigation I was retained in four different mining suits. In view of the fact that it was unlikely that I should be able to attend to the details of this litigation, Mr. Janin was selected to dig out the details, which, with his assistants, you see what has been accomplished today. I was not aware at that time, nor until Mr. Janin and his assistants had dug it out, that there was any such thing as a northeasterly series of fissures. Q. What did you believe them to be? A. I believed that there was one vein there. Q. Well, with what course or direction or strike? A. I believed that the principal vein then was northwest and southeast, as the developments have since shown. Without anticipating, I will simply, in answer to the question, state that to the eye it is plain enough that, if this be but one fissure, as I then supposed it to be, it certainly, as it goes down in depth, warps off to the northwest, and that brings me down to the position where we are at present."

In this connection it is pertinent to state that the first suit in this litigation was brought by the Grass Valley Company against the Pennsylvania Company on February 16, 1900. Upon cross-examination Mr. Keyes testified as follows:

"Mr. Lindley: Q. I understood you to say in your direct examination that your original understanding of this formation was that there was a single fissure in the W. Y. O. D.? A. Yes, sir. Q. When did you get your revelation that there was more than one? A. After Mr. Janin and his assistants had dug out the facts. Q. How long was that after you became consulting engineer of this mine? A. It was probably within a year. Q. During all that time you had been through the mine as the consulting engineer of the company? A. Yes, sir. Q. As far as its workings northerly have been projected? A. I had. Q. Had you ever been in the Pennsylvania mine up to that time? A. I had not. Q. Did you ever ask permission to go in?

A. I did not. I went in with our party under the understanding we were permitted to go. Q. I mean prior to this litigation. A. I did not. Q. Prior to your discovery that there was more than one vein? A. I did not. Q. How many veins do you now say there are in the W. Y. O. D.? A. Two systems. Q. Well, how many distinct veins? A. I should say that there were—in the Pennsylvania? Q. In the W. Y. O. D.? A. In the W. Y. O. D. I would say that there are two or three, perhaps four, parallel sheetings to the northwest series, and parallel to the northeast series. Q. Have the joint planes anything to do with those veins? A. I don't think they have. Q. While you agree with Mr. Janin's results as to being more than one vein, you disagree with him as to the joint plane business? A. Allow me to explain. Mr. Janin has evolved a theory to account for these fissures. He has spent a great deal of time upon it, and it may serve to account for the fissures. I have a great respect for any theory enunciated by Mr. Janin. I have not had time enough to prove or disprove, reject or to accept, his conclusions. Q. You do accept his conclusions, because you say you originally were a one-vein man, and that you were converted by Mr. Janin's investigation of the facts? A. I was converted by the result of Mr. Janin and his assistants' examination of the facts as apparent in the ground. Q. Then you are testifying as an expert here upon the examination of Mr. Janin and his assistants? A. I am testifying upon the facts as dug out by these gentlemen. Q. You were the consulting engineer of the company for over a year before Mr. Janin came there? A. Yes, sir. Q. And you did not dig out any? A. Not till these facts were finally determined. Q. These facts you speak of, are they facts that would come to the observation of an ordinary miner? A. Perhaps yes, and perhaps no. Q. What is your candid judgment about that? You did not discover it for a year, and you are no ordinary miner. A. I am much obliged. I don't think he would. Q. Is it not a matter of fact that the miner in these two mines has gone on regardless of all ideas of intersection,—he has followed the ore body? A. Unquestionably he has. The fact is, the superstition has existed that the fissures were north and south. As a matter of fact, the miner follows his ore where he finds it, and as a matter of fact in this mine the miners have followed off on one at least or more of these northeasterly fissures. He followed where the ore was, and, although the belief has existed for many years that there was but one there, we find today that there are two."

We have here in this testimony of an expert engineer and a practical mining man, who is familiar with the district in which these mines are located, the statement of four import-

ant facts to be considered in determining the course and direction of the Pennsylvania apex vein upon the surface: First, that prior to the year 1899 it was the belief of practical miners that but two veins existed in the W. Y. O. D. and Pennsylvania claims, one in the W. Y. O. D. and one in the Pennsylvania; second, that these two veins or fissures ran in a general direction north and south, or, to be more accurate, northwest and southeast; third, that in the year 1899 a discovery is claimed to have been made by Mr. Janin, the expert engineer, that there was another series of veins in these claims, running northeast and southwest; fourth, that prior to this supposed discovery of the second series of veins the right of the Pennsylvania Company to follow the Pennsylvania vein on its dip to the west or to the south of west had not been questioned. The testimony of the witnesses who had traced this apex vein by means of cuts and shafts at intervals along the surface is too much in detail to be repeated here. It is sufficient to say that, in my judgment, it establishes the course and direction of a single vein, as shown by the diagram "Pennsylvania Exhibit No. 2." The claim made by the Grass Valley Company that there were other veins apexing within the side lines of the Pennsylvania claim running in substantially the same direction, and that these veins were crossed by still other veins at more or less obtuse angles, giving the general appearance of a single vein for the entire distance, was met by explorations made during the trial by the Pennsylvania Company by means of box trenches at points claimed to be crossings. In my judgment, this evidence demonstrated the existence of nothing more than a main vein with projected seams or spurs at these points. These seams or spurs were not traced for any distance, and were not found crossing any side line of the Pennsylvania claim. Whatever these seams or spurs may be called, or to whatever extent they may have been found, they did not destroy the continuity of the main vein. These crossing seams were

called by the Grass Valley Company "transverse veins," and were described by Mr. Kerr, a mining engineer, and general superintendent of the Grass Valley Company, who was called as a witness for that company. He said that the veins intersecting the main vein were transverse veins. "Any vein," he said, "that has a dip opposite the regular west dipping veins, are transverse veins. It makes no difference whether they dip to the east, to the southeast, or to the south; so long as they dip in an opposite direction from the regular vein which we have in this vicinity, which are the west dip veins, we call them the transverse veins." This witness endeavored to establish at least three of these transverse veins at the surface of the Pennsylvania claim by projections from the strike of the stopes in the workings of the mine below, but in every instance these projections failed to conform to anything claimed as a transverse vein upon the surface. It will be further observed that Mr. Kerr admits that the west dipping vein in this vicinity is the "regular" or "main" vein. This, in my opinion, is an important fact, which of itself tends most strongly to establish the continuity of the Pennsylvania vein.

But what was the nature of the discovery made in the year 1899 that in the judgment of Mr. Keyes established the fact that there is a second series of fissures in these two mining claims? The discovery is attributed to Mr. Louis Janin, the expert mining engineer and mining geologist. He was called as a witness by the Grass Valley Company, and testified fully upon the subject. In brief, his statement was that he had found in these two mines and in other places a rhombohedral structure of the granite and grano-diorite, and that the dislocations in the joint planes of such structure would open transverse fissures. Mr. Janin illustrated his views of this character of rock structure by models, pictures, and diagrams, and by an elaborate geological exposition that was exceedingly interesting; but his theory of rhombohedral rock

structure did not necessarily establish the persistence and continuity of any or any number of transverse fissures in the Pennsylvania claim. In other words, his theory might be true, but in a given mass of granite or grano-diorite there might be only one continuous opening of successive joint planes, or there might be one continuous opening through disjointed planes. In either case a vein filling the fissure and reaching the surface would expose but one apex. This fact was well stated by Mr. Janin himself in the course of his examination, as follows:

"Q. The formation of the structure of rock into the rhombohedron form does not necessarily determine that there will be a number of veins? A. No, sir; far from it. Q. The pressure may make the line of least resistance simply one vein to the surface? A. It might be to one vein. Q. But it would follow the lines of the rhombohedron structure? A. Yes. It would follow on the face of the rhombohedron."

The court is of the opinion that the evidence establishes the existence of a vein or lode apexing within the surface boundaries of the Pennsylvania claim, and that there is a continuity of this vein or lode lengthwise of the claim to the extent and in the direction necessary to embrace within extended end line planes the vein or lode in controversy.

The remaining question is, has this vein or lode such a continuity and persistence in its dip or downward course as to include the ore deposit in dispute? For the purpose of illustrating the position, extent, and direction of the Pennsylvania vein and its relation to the W. Y. O. D. vein, together with the shafts, levels, drifts, winzes, upraises, stopes, and other works of these two mines, and their relation to each other underground, two models were introduced in evidence, one provided by the Pennsylvania Company, and marked "Exhibit 4"; the other by the Grass Valley Company, in two sections, the first representing the W. Y. O. D. mine and its works, marked "Exhibit P," and the other representing

the Pennsylvania mine and its works, marked "Exhibit Q." The two models represent in reduced form the spaces from which ore has been taken, the ore deposit in dispute, and the works in the two mines in such necessary detail, designated by numbers, as to inform the court, in connection with the maps, charts, diagrams, and evidence of engineers, experts, and practical miners, concerning the available facts in the case. Taking the Pennsylvania shaft for an initial point, as shown on the model Exhibit No. 4, and as explained by the evidence, we find from the surface down to the 100-foot level but one shaft. At the 100-foot level the shaft is divided into two shafts, designated as the upper and lower shafts. Between the 300 and 400 foot levels the upper shaft is divided into two shafts, designated as the upper and middle shafts. The vein between the 100 and 300 foot levels maintains practically a uniform and regular dip and strike, and the present stopes indicate that the ore shoot was from 200 to 300 feet wide. As the vein descends from the 200-foot level, it passes through the perpendicular side lines of the Pennsylvania claim, and at the 300-foot level it is wholly to the west of such side lines. Between the 300 and 400 foot levels, just above the point of division between the upper and middle shafts, the shaft passes through the vein at a point designated as the "Chicken Coop," where the Grass Valley Company contends the continuity of the Pennsylvania vein is broken, or at least that it passes upward, and has not been followed. But to the north of the shaft, and on the same horizontal plane, the continuity of the vein is unbroken, and the vein followed down through stopes to the 400 and 500 foot levels. At this last level stopes are found returning north, and across the middle shaft, descending to the 600-foot level. The stopes at the 500-foot level extend north and south about 250 feet, indicating that the vein preserved its continuity to the north as it descended through the 600 south stope and the 600 stope to the 600-foot level. Still further to the north

we find a stope designated as the "600 Underlap Stope." This stope is connected with the 600 stope, and in turn it is connected with the 600 north stope. Following down this latter stope, we come to the intermediate north stope, and following this stope around and over a stope designated as the "Hogsback," we reach the intermediate stope, and descend by the 700 north stope to the 700-foot level. Returning to the 600-foot level, we may descend by the stope designated as the "Intermediate Stope" directly to the 700 north stope and the 700-foot level. Down to this point we have descended by continuous stopes, indicating the original continuity of the vein from the surface to the 700-foot level by the course indicated. But at three or four other points this continuity has not been found, and connections between the upper and lower portions of the same vein, as claimed by the Pennsylvania Company, or between different veins, as claimed by the Grass Valley Company, had been made by stepping down at different places a distance of from 6 to 8 feet through country rock. These disconnected sections were designated on the trial as "complications," and the use of this term will be continued in this opinion. One of these complications was shown on the model Exhibit 4 just below the 300-foot level, between the stations marked "401" and "402," where the vertical distance between the seams was 6 to 7 feet. Another was shown below the 400-foot level at station 640½, where there were two drops of 7 or 8 feet each. South of the shaft another route is found from the surface to the 700-foot level, descending through continuous veins and stopes, except at one point marked on the model as "Station 770½," where there is a vertical drop of 7 or 8 feet. These complications disclose east-dipping seams, which the Grass Valley Company claims belong to independent transverse fissures, but which the Pennsylvania Company claims are vein connections between overlying and underlying sections of west-dip-

ping fissures. The following figure will illustrate the claim of the Pennsylvania Company as to these connections:

The testimony of Ross E. Browne explains these connections as follows:

"In the case of the Pennsylvania vein we have the complexity of fissuring. There is also some ore in the included masses of country rock, due to impregnation. These masses have been altered and softened by percolating waters, and are traversed by many small fissures filled with ore-bearing material, constituting irregular ore bodies. There are no complications in the Pennsylvania vein in other respects. There is no complication due to displacement or faulting. The original continuity of the fissuring is still maintained. There are no complications due to the intersection of veins. All branches are apparently contemporaneous in origin, and when they come together they form junctions like the confluence of the forks of a river. A possible exception to this rule may be noted in connection with the so-called crossings. They constitute a series of small, almost vertical fissures crossing and cutting through the east and west dip fissures on entirely contrary courses. They are small and barren as a rule, carrying frequently a little clay, and rarely a little quartz. In no case that I know has one of them been mined for ore in the Pennsylvania mine. Their effect on the vein is somewhat obscure. They do not fault the vein, but frequently the vein bends and steepens a little in passing through them. I shall not attempt to attach any significance to these crossings. The country rock of the ground in dispute is wholly grano-diorite,—a rock very similar to granite. For all practical purposes we may call it granite, as the miner does. We may then add that there are no complications due to changes of formation. The Pennsylvania vein may now be defined as the filling of a complex of inter-connected fissures in a homogeneous mass of country rock; the various parts being of con-

temporaneous origin, and culminating in a common apex. This vein apexes and continues downward several hundred feet as a comparatively simple fissure vein. Thence downward it grows more complex, but persistently maintains its identity. It is apparently more simple again on the bottom level. The term 'common apex' requires explanation in connection with my designation of this complex mass as a single vein or lode. Referring to the red color on the model, representing the Pennsylvania vein, I am strongly of the opinion that, starting from any important point of development on the lower levels, a branch of the vein is traceable upward along a continuous line of mineralization, or of vein matter, through underlaps, east dippers, and overlaps, to the Pennsylvania apex. It is not always possible to make such tracing through the present openings. There would be required a ruinous amount of deadwork to enable such a thing; but the continuity is pretty generally indicated where the development is wanting. There are many fissures or seams departing from the main line of ore bodies on divergent courses. These weaken and pinch out, or if not sufficiently developed to exhibit this as a fact, the indications are definitely that way. These departing seams most commonly dip downward; or, if they start upward, they are apt to turn over, and ultimately dip downward. Still there are doubtless some of these seams which persist in an upward course, and, dying out in the country rock, have blind apices of their own. I must, therefore, explain that in speaking of the apex of the vein I treat these as insignificant offshoots or spurs, and not as separate branch veins. These east dippers or east droppers, have about the same strike as the west dip fissures, but a contrary dip. They characteristically connect two west dip fissures without cutting across either. They flow from one to the other. In no case that I have seen do these east dippers cut through a strong overlap or underlap west dip fissure. A striking feature of this mine is the part these east dippers take in leading to a stepping down from an overlapping to an underlapping west dip fissure. It is an unusual occurrence, so far as my experience goes; but there is nothing strange about it, any more than in many other cases. It is the natural result of the lines of weakness and the lines of strain; hence the lines of fissuring in this particular section. There are certain sections of the mine where, if we follow the main fissure downward on its westerly dip, we find it flattening, weakening, and pinching out; but before pinching there fall from it a series of east dip fissues which connect below with an underlapping west dip fissure. This underlap flattens, weakens and pinches out on its upward course, but on its downward course it strengthens, and becomes a strong ore-bearing vein."

The witness here illustrated his statement by a drawing, "B, Exhibit 10," set out on a preceding page, and continued:

"This overlapping west dip fissure on its downward course flattens, weakens, and ultimately pinches out, but before pinching out there fall from it a series of east dip fissures, which connect below with an underlapping west dip fissure. This underlapping west dip fissure, if we follow it on its upward course, flattens, weakens, and pinches out. If we follow it on its downward course, it strengthens, and becomes again a strong ore-bearing fissure. That is characteristic of the Pennsylvania mine,—some of the sections of the Pennsylvania mine. This, as I have stated, is an unusual occurrence,—this stepping down by such a system as that. There is a method of stepping down that is very well known in connection with veins, and that is by a system of step faulting. But the case we have in hand, although perhaps somewhat similar in effect, is very different structurally. There is no faulting in the Pennsylvania section, no displacement of the country rock. The channel through which the mineralizing solutions passed is simply complicated by this network of fissures. Its continuity as a channel is not disturbed. The continuity of the vein is definitely maintained. Regarding the theory of the formation of these veins, the country rock was first fissured and fractured. Some of the fissures reached to great depth, and tapped a deep-seated source of mineralization, from which solutions arose, circulated through the fissures, deposited the quartz with its gold contents, and finally escaped to the surface. Once conceive the mineralization to be due to the circulation of solutions through the open channel prepared by the complex fissuring, and there is no more difficulty in recognizing the complex than the simple parts of the vein as a unit. Concerning this unity, it seems to me the only legitimate question is, do these inter-connected parts apex separately or together? I have already expressed my opinion in the matter: they join and apex together."

This vein connection described by Mr. Browne between the west dipping fissures through east dipping seams or fissures, is confirmed by a number of other witnesses. But against the sufficiency of this evidence to establish the continuity of the Pennsylvania vein the Grass Valley Company contends that the east dipping fissures pass on, and constitute an independent series of transverse fissures, breaking the con-

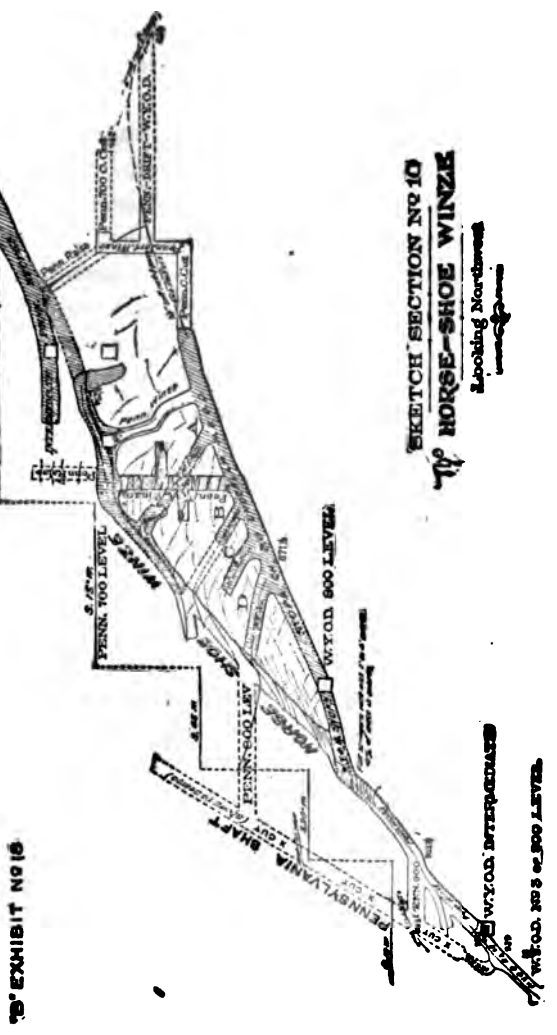
tinuity of the Pennsylvania vein on its dip to the west. The answer to this contention is found in the fact that the continuation of the east dipping fissures has not been satisfactorily established at any point where the two veins have come together; while, on the other hand, the Pennsylvania Company has prosecuted its work on the main west dipping vein, finding the continuity of this vein beyond the point of the east-dipping connections, and this has been the work of the practical miner following the main vein in its downward course. To my mind, the most conclusive fact establishing the continuity of the Pennsylvania vein is this fact that the vein can be followed as a dominant persistent vein from the surface through continuous stopes down to the lower workings of the mine.

When suit was commenced by the Grass Valley Company against the Pennsylvania Company in February, 1900, the Pennsylvania Company had reached the 700-foot level of the mine. As has already been stated, this suit was based upon the discovery made by the Grass Valley Company that the principal fissures of the W. Y. O. D. mine were making off to the northwest. The W. Y. O. D. vein apexes about 500 feet east of the Pennsylvania vein, and the W. Y. O. D. shaft is about 900 feet south of the Pennsylvania shaft. The discovery as to the direction of the principal fissures of the W. Y. O. D. vein appears to have been made in driving north and northwest the 800-foot level of the W. Y. O. D. mine. In time that level reached a point beneath the Pennsylvania works, and the Grass Valley Company proceeded to take ore from that section. The workings of the two companies eventually came together at a number of different points below the Pennsylvania 700-foot level. Below this level other complications occur in the vein, and the Grass Valley Company again contends that the Pennsylvania vein has been cut off by east dipping fissures, and that the vein no longer retains its continuity, whatever may have been its fate above.

We have now reached the most important feature in this case, namely, the vein structure below the Pennsylvania 700-foot level, where a number of east dipping fissures have been developed, and where the stopes show that the strike of the vein has changed more to the west. The continuity of the Pennsylvania vein down to the lowest workings of the mine is, however, supported by features that, in my judgment, have not been overcome. South of the Pennsylvania Middle shaft the Pennsylvania Company has sunk a winze from the Pennsylvania 700-foot level, following the vein down to the 900 W. Y. O. D. level; and north of the shaft another winze has been sunk from the same Pennsylvania level, which, together with the W. Y. O. D. upraise, follows the vein also down to the 900-foot W. Y. O. D. level. Here, at two points in the mine, about 400 feet apart, the Pennsylvania vein continues down without a break or complication to the lowest workings of the mine. This is a fact that cannot be ignored, and has not, in my judgment, been overcome by evidence of complications eleswhere. One of these complications is found in what is known as the "Horseshoe" winze north of the Pennsylvania shaft. The winze starts from the bottom of the stope of the 700-foot level, and descends to the 800-foot level, a distance of about 120 feet. The claim of the Pennsylvania Company that this vein is continuous at this point has been vigorously contested by the Grass Valley Company, and much interesting testimony has been introduced concerning this section. The Pennsylvania Company claims that the entire section is mineralized, and, in addition, that the vein descends through connecting east dipping fissures in the same manner as at other points in the mine, to which reference has heretofore been made. The following diagram illustrates the character of the Horseshoe winze, as shown by the evidence.

Considering the testimony relating to this winze in connection with the testimony showing the continuity of the vein at the other points mentioned on the same horizontal plane,

the complications found here are certainly not beyond explanation, and under the circumstances the explanation given



appears to be satisfactory. The theory of Mr. Janin that the massive country rock of this district has the rhombohedral

structure, and that the joint planes along which the fissures were formed were the faces of the rhombohedral sections of rock, does not, in my opinion, conflict with the claim that the main west dipping vein maintains its continuity through the complications found in the Pennsylvania mine. On the contrary, it may explain such complications, and account for the segments of transverse fissures found connecting the upper and lower parts of the west dipping vein. The contractions and tiltings of the earth's surface would necessarily open zigzag fissures along the planes of rhombohedral sections, and circulating currents, either ascending or descending, following the lines of least resistance, would form a vein in a zigzag channel through the fissured rock, in the changing courses of which would naturally be found the deposits developed in this mine. In other words, the transverse fissures claimed by Mr. Janin for his rhombohedral sections may explain the form and extent of the east dippers found in the Pennsylvania mine.

The strike of the vein at and below the 700-foot level has also been urged by the Grass Valley Company as a fact of great significance. It is contended that the strike of the vein at this point is such that it cannot be the same vein as the one found at or near the surface. This fact would be of some importance if the vein was an ideal one, maintaining a uniform strike and dip throughout its entire course. But it is not an ideal vein, and there are very few such to be found. Mr. Keyes has found but one in his long and varied experience, and the extent of litigation based upon extraordinary departures from the ideal vein indicates that they are rarely found. In the *North Star Case,* 73 Fed. 597, in this court the vein in controversy was in the Grass Valley district. It was there found that the strike of the vein below was at many places almost at right angles to the strike of the vein at the surface. This twisting or turning of the vein is accounted for there, as here, by the folding of the rock under

pressure and contraction, such as we find demonstrated by geological investigation throughout this region. This objection to the Pennsylvania vein is, in my judgment, without any force, and requires no further discussion.

The relation of the Crescent claim to this controversy may be disposed of in a few words. It is an old claim, running north and south, with a vein apparently dipping to the east; but no development has been made on the surface or elsewhere showing any connection whatever between the vein found on the surface and the vein in dispute. In the absence of such a showing, the evidence in favor of the continuity of the Pennsylvania vein must prevail.

It follows from these considerations that I am of the opinion that the Pennsylvania Company has established its right to all the ore bodies and sections of the mine in dispute. The evidence as to how far south this right extends on the so-called underlap is not very clear, but a trough line or depression has been found in the vein extending from the 900-foot W. Y. O. D. level in a direction a little north of east up to near the 800-foot W. Y. O. D. level. This trough line starts from the 900-foot W. Y. O. D. level at a point about 150 feet south of the Pennsylvania shaft projected to that level. In the absence of evidence showing a clearer division between the Pennsylvania and W. Y. O. D. veins, this line will be adopted by the court as the dividing line between the two veins in this particular section.

The first case will be referred to a referee or commissioner to be appointed by the court, to take testimony and report as to the damage sustained by the Pennsylvania Company by reason of the wrongful acts of the Grass Valley Company, and such further preceedings will thereupon be had as are provided for in the stipulation of the parties dated April 17, 1901. In the second case a finding will be prepared and a judgment entered in favor of the defendant.

THE MCDERMOTT MINING CO. v. PETER S. MCDERMOTT.

(27 Montana 143; 69 Pac. 715. July 28, 1902.)

[1]**Abandonment by grantee. Title by relocation acquired by grantor.** McDermott sold a lode claim to the company by deed in which he granted, bargained and sold the premises with a special covenant that the deed should pass the patented title which it recited had been applied for. The patent application was not prosecuted to entry but on the contrary the company neglected to do the annual labor and allowed the lode to be relocated by a stranger who sold to McDermott. *Held*, that the title by relocation did not pass to the grantee company.

[2]**Reverts to the United States.** Upon abandonment an unpatented claim becomes a part of the public domain.

Abandonment under such circumstances is equivalent to a quit-claim to the government and the party whose duty it was to do the work is estopped to claim the new title acquired by the relocation.

[3]**A director in a company** which forfeits to the government its title, in the absence of all collusion, may purchase and hold the title of the relocator of the claim.

Appeal from District Court, Granite County; F. H. WOODY, Judge.

Action by the McDermott Mining Company against Peter

[1]*Brown* v. *Oregon Co.*, 110 Fed. 728. *Minah Co.* v. *Briscoe*, 89 Fed. 891.

[2]*Carter* v. *Bacigalupi*, 83 Cal. 187; 23 Pac. 362.

[3]Relation of its officers to the Company as to the right to compete in purchases. *Legarde* v. *Anniston Co.*, 20 M. R. 545. *Mackey* v. *Burns*, 16 Colo. App. 6; 64 Pac. 485.

The managing officers of a corporation entered into secret agreement for the formation of a new corporation in which they were to have the controlling interest: *Held*, that the contract made with such new corporation without the knowledge of the stockholders was voidable. *Attalla Co.* v. *Virginia Co.* 111 Tenn. 527; 77 S. W. 774.

A third party cannot attack the validity of a corporate deed for non-compliance with statutory requirements. Such requirements are for the protection of the stockholders. *Galbraith* v. *Shasta Co.*, 143 Cal. 94, 76 Pac. 901.

S. McDermott, as administrator of the estate of Michael McDermott, deceased, and others. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

RODGERS & RODGERS, ED. SCHARNIKOW, H. P. NAPTON, and FORBIS & EVANS, for appellant.

D. M. DURFEE, and McCONNELL & McCONNELL, for respondents.

PIGOTT, J. This action was brought to quiet title in the plaintiff to the Northwest lode mining claim, and to obtain a decree requiring the defendants to convey the property to the plaintiff. From an order refusing the plaintiff a new trial, and from the judgment, these appeals are prosecuted.

The following facts are conceded: Michael McDermott, whose administrator is one of the defendants, owned the Nortwest lode claim (not patented) in 1889, and in that year he and others organized the plaintiff corporation, which, on August 14, 1889, purchased the claim, paying to McDermott therefor a part of its capital stock. In the granting clause of this deed, McDermott

"Granted, bargained, sold, remised, released, and forever quitclaimed."

The Northwest lode mining claim. In the habendum and tenendum clause is the following covenant:

"It is expressly covenanted that it is intended hereby to convey any and all right, title, interest and estate which may hereafter be acquired to said premises, or any part thereof, by virtue of any patent which may hereafter be issued by the United States government therefor under the proceedings heretofore instituted in that behalf."

It does not appear that a patent was ever issued. Upon the

delivery of the deed the plaintiff took possession, and expended $4,000 in working the claim. In June, 1890, the plaintiff, not having been able to find any ore of value, and being without ready money, suspended work, closed the mine, and moved the machinery (which it had rented) therefrom. In the autumn of that year, one of the trustees of the plaintiff placed with McDermott a small amount of personal property belonging to it, with directions to take care of the same, and to look after the mining claim, his wages to be $25 a month; but he was not employed for any definite length of time. In 1891 the plaintiff caused to be done the annual work necessary to prevent a forfeiture. No work of any kind whatever was done by the plaintiff in or about the claim after 1891. Between June, 1890, and the 23d day of November, 1897,—a period of seven years and four months,—the board of trustees held no meeting, and no entries in the books were made. From the time the plaintiff corporation was formed until the death of McDermott, he was one of its trustees or directors, and during the time the claim was worked he was employed as a common laborer thereon. The representation work not having been done for the year 1892, and work not having been resumed thereon after December 31st of that year, the mining ground became subject to relocation as part of the public mineral domain of the United States. On the 4th day of January, 1893, one Brogan duly located the mining ground in question as the "Shamrock," and entered into its possession. Thereafter, and on the 28th day of February, 1893, Brogan by deed conveyed the Shamrock claim so located by him to Michael McDermott for the consideration of $5. In August, 1897, McDermott died, and the defendant, Peter S. McDermott was appointed administrator of his estate The other defendants McDermott are the heirs at law of the decedent, and the remaining defendants were lessees having the option of purchasing the claim. In that month the officers of the plaintiff learned that there had

been discovered in the claim a body of pay ore by the lessees; whereupon the board of trustees met in the following November, and a claim of ownership to the Shamrock lode was made. As we have said, the foregoing facts are undisputed.

The contested questions of ultimate fact are: (1) Had the plaintiff abandoned the Northwest lode claim prior to the location by Brogan? and (2) if the claim was not so abandoned, did Michael McDermott, in violation of any duty which he owed to the company, allow the claim to be unrepresented for the year 1892, and cause Brogan to locate it for his benefit? These questions the jury and the court solved in favor of the defendants, finding that the plaintiff failed to represent the Northwest lode mining claim in 1892, with the intention of abandoning it; that the plaintiff did abandon the claim on December 31, 1892; that Brogan located the Shamrock claim without any intention to convey the same to McDermott, and did not make the location for or in the interest of McDermott; and that McDermott was not, during the year 1892, the agent of the plaintiff, charged with the duty of seeing that the annual labor was done to prevent forfeiture.

Did the deed from McDermott to the plaintiff convey to it the title thereafter acquired by him from Brogan, or estop him from asserting, as against the plaintiff, the title obtained from Brogan? Did the title obtained by McDermott from Brogan inure to the plaintiff by virtue of any trust relation between McDermott and the plaintiff?

The rule of the common law is that when a deed of land contains a covenant of warranty or representation, express or implied, of title, particular or general, in the grantor, who had not then the title so warranted or represented, but afterwards acquires it by descent or purchase, such subsequently acquired title instantly inures to the benefit of the grantee. The grantor is estopped from asserting such title in himself as against his grantee; he is not permitted to contradict the

terms of the deed by saying that he did not have the title which he represented or covenanted was his. So the practical effect of the estoppel is to invest the grantee with the title formerly acquired by the grantor. This doctrine rests altogether upon the ground of estoppel. Except in so far as it has been modified by statute, it was in force in Montana when the deeds in the case at bar were made. Now at the common law the words "grant, bargain and sell," as they did not imply a covenant of warranty or representation of title in the grantor, could not estop him from asserting a title which he subsequently acquired. Nor did section 285, div. 5, Gen. Laws, Comp. St. 1887, entirely change the unwritten law in this regard; for the covenants implied by the words quoted are that the grantor has not previously conveyed the same real estate, or any right, title, or interest therein, to any person other than the grantee, and that it is free from encumbrances made or suffered by the grantor or any person claiming under him. But section 267 provides:

"If any person convey any real estate by conveyance purporting to convey the same in fee simple absolute, and shall not, at the time of such conveyance, have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance."

According to the construction of this section in *Meyendorf* v. *Frohner,* 3 Mont. 282, and in *Clark* v. *Baker,* 14 Cal. 612, 76 Am. Dec. 449, the rule of the common law as to the effect of deeds under the statute of uses upon the subsequently acquired estate of the grantor has been changed thereby, and the words "grant, bargain and sell" serve to convey the after-acquired title. We may therefore assume that, while the granting clause in the deed from McDermott to the plaintiff did not, when tested by the rules of the common law, serve to estop the grantor, yet that, under section 267, *supra,* the

clause had the effect of passing to the plaintiff, so long as it held under the deed, whatever outstanding title he might acquire; and we may also assume, though it is unnecessary to do so, that the language in the latter portion of the deed is sufficient, both at the common law and under the statutes, to estop McDermott and his privies from asserting title afterwards acquired by him or them inconsistent with the title intended to be conveyed by the deed. In other words, we may concede that the deed from McDermott to the plaintiff was effectual to convey to it any title which McDermott might thereafter acquire, provided the plaintiff still lawfully claimed under the deed.

But neither the rule of the common law nor that prescribed by section 267, *supra,* has application to the present case. The court found that the plaintiff, with the intention to abandon it, failed to represent the Northwest lode claim in 1892, and actually did abandon it on December 31st of that year. The careful examination to which we have subjected the record enables us to say that the evidence was sufficient to justify this finding. Again, even if there was not an abandonment it is admitted that, by reason of the plaintiff's neglect to represent in 1892, the claim was open to relocation and consequent forfeiture. While it was subject to forfeiture, Brogan located it. The court found that Brogan made the location in good faith for himself, and not for McDermott; that McDermott was not charged with the duty of seeing that the annual representation was performed; and that there was no agreement or conspiracy between McDermott and Brogan to locate the claim for the former's benefit; and these findings were justified by the evidence. Abandonment operated, *ipso facto,* to extinguish the right and defeasible title of the plaintiff, the claim at once reverted to the public domain, and any qualified person could relocate the ground. If there was not an abandonment, then the plaintiff's failure to do the representation for 1892, coupled

with its failure to resume work in 1893 before Brogan in good faith made his location, constituted a foreiture, extinguished the plaintiff's right, reinvested the government with full title, and simultaneously clothed Brogan with the rights flowing from a valid location. In either event—abandonment or forfeiture—the plaintiff ceased to own or have any interest in the claim.

Provided it does not negative the validity or impair the efficacy of the title which he purported to convey, or violate the covenants in his deed, the grantor may acquire a title subsequently, and assert it against his grantee. 3 Washb. Real Prop. (6th Ed.) p. 110, § 1933; Tied. Real Prop. p. 551, § 727, and cases there cited. The purpose of the rules referred to is not to deprive the grantor of the right to become the owner of the property which he has conveyed. Abandonment was equivalent in effect to a deed by the plaintiff surrendering the claim to the government; forfeiture was tantamount to such a deed, and to a grant from the government to Brogan conferring upon him the rights and privileges of a locator. The deed from McDermott to the plaintiff conveyed all the possessory right which McDermott held in that part of the mineral land of the United States covered by the Northwest lode claim, and also the title which McDermott might thereafter acquire by patent issued to perfect the title obtained by location and compliance with the law; the only title outstanding was that of the government; the plaintiff either surrendered by abandonment, or lost by forfeiture, without the fault of McDermott, its defeasible title; if surrendered by abandonment, the estate of the plaintiff reverted to the government, and was merged in the paramount title; if lost by forfeiture through Brogan's location, there was a return and merger, and at the same moment of time a grant by the government to the new locator. As already observed, by abandonment an unpatented mining claim necessarily becomes part of the public domain; by forfeiture it became such

for an instant only; the merger and new grant being simultaneous. The land embraced within the claim of the plaintiff was therefore part of the public mineral lands at the time Brogan located the Shamrock lode claim. It cannot reasonably be contended that, in the absence of fraud, the title acquired by McDermott from Brogan passed to the plaintiff. If A. (McDermott) conveys land to B. (plaintiff), and B. quitclaims to C. (the government), and C. conveys to D. (Brogan) and D. to A. (McDermott), certainly B. (plaintiff) will not be heard to say that when A. (Mc Dermott) acquired title from D. (Brogan) it passed to B., or that A. (McDermott) is estopped. Brogan, having by his location acquired a title which was good as against the plaintiff, lawfully conveyed to McDermott, who acquired the title of the locator; and the fact that McDermott was at the time a stockholder and trustee or director of the plaintiff in nowise lessened his right so to purchase and hold the mining ground. The title obtained from Brogan did not inure to the benefit of the company.

The evidence was sufficient to justify the findings, and the latter support the judgment. The only questions presented are those which we have discussed. The case seems to have been well and carefully tried by the learned judge of the district court.

The judgment and the order overruling the motion for a new trial are affirmed.

Affirmed.

Milburn, J. I concur.

The Chief Justice, being disqualified, takes no part in the foregoing decision.

ANACONDA COPPER MINING CO. v. F. AUGUSTUS HEINZE ET AL.

(27 Montana 161; 69 Pac. 909. Supreme Court. Aug. 2, 1902.)

[1]**A fault in the vein does not prevent its owners following it** down on the apex, if its continuity through the fault is made apparent.

[2]**Burden on the extralateral claimant.** In an action to restrain defendants, who are engaged in removing ores from beneath the surface of plaintiff's ground, the burden is on defendants to show that they are not trespassers, and that they have a right to follow the vein into plaintiff's territory; and in case of doubt an injunction should be granted.

Copies of affidavits. Where, on an application for an injunction, affidavits offered by defendants were received over plaintiff's objection that copies had not been served on his counsel, as required by the rules of the district court, and the record does not show the provisions of such rule, the supreme court is unable to say whether the ruling was erroneous.

No notice of trial between third parties. On an application for injunction to restrain defendants from removing ores from plaintiff's ground, the court cannot consider the evidence in another action involving the title to the same vein, but to which this plaintiff was not a party, or interested, either where such evidence is embraced in affidavits or on the court's own recollection thereof.

President cannot bind company to sell. Under Civ. Code, §§ 1012, 1013, providing that the trustees or officers of any mining corporation shall not have power to sell any part of the mining ground unless the sale is first authorized by a vote of two-thirds of all the stockholders at a meeting called for that purpose at which three-fourths of the stock is represented, a proposition by the president that on deposit of a specified sum as the purchase price the corporation will at once proceed to obtain the requisite consent of its stockholders

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[1]*Raisbeck* v. *Anthony*, 17 M. R. 148; *Cheesman* v. *Shreve*, 17 M. R. 260.

[2]*Duggan* v. *Davey*, 17 M. R. 59.

The vein may be followed between its end lines though they are at such angle to the vein as to follow the strike rather than the dip. *Bunker Hill Co.* v. *Empire St. Co.* 134 Fed. 268.

Where a segment is cut out of a lode by the dip rights of another lode the ore beyond the segment belongs to the junior claim. *Id.*

for selling, and will then sell and convey a specified portion of its mining claim, and the acceptance of such proposition and deposit of the money, do not give the proposed purchaser an equitable title to the mine, or right to extract ore therefrom.

Evidence of apex on rebuttal. Where, in an action to restrain defendants from taking ore from beneath the surface of plaintiff's ground, defendants had introduced evidence that the apex of the vein was in their ground, and that it could be traced to the point where they were working, evidence by plaintiff tending to show that the vein was not continuous was proper rebuttal.

Reversal for receiving improper evidence. Where, on a motion for an injunction to restrain defendants from taking ore from beneath the surface of plaintiff's ground, the court has received incompetent evidence for defendants, and excluded material evidence offered by plaintiff, and it is reasonably apparent that the court was influenced thereby in denying the motion, the order will be reversed, even though the competent evidence received was sufficient to sustain the order.

Appeal from District Court, Silver Bow County; WM. CLANCY, Judge.

Action by the Anaconda Copper Mining Company against F. Augustus Heinze and others. From an order denying a temporary injunction, plaintiff appeals. Reversed.

W. W. DIXON, A. J. SHORES, C. F. KELLY, and D. GAY STIVERS, for appellant.

MCHATTON & COTTER and J. M. DENNY, for respondents.

BRANTLY, C. J. Action in ejectment and for damages, in which plaintiff seeks to recover possession of the Snow Bird

Where two locations have each a parcel of the apex the senior title takes the whole vein on its dip. *U. S. M. Co.* v. *Lawson*, 134 Fed. 769. A patent upon a location made before May 10, 1872, and application pending before that date but not entered until after the passage of the Mining Act of that date, has extralateral rights, although its end lines are not parallel. *Central Co.* v. *E. Central Co.* 146 Cal. 147; 79 Pac. 834.

quartz lode mining claim, situate in Silver Bow county, and the value of ores removed therefrom by the defendants. Equitable relief by way of injunction is also sought to restrain removal of ores pending the action, and perpetually, in case plaintiff succeeds in obtaining judgment.

Upon filing the complaint the plaintiff applied for and obtained an order requiring the defendants to show cause why they should not be enjoined pending the action. They appeared, and filed a joint answer, and, after denying that they were guilty of trespassing upon the property, set up an equitable counterclaim, by which they seek to obtain a decree adjudging the defendant F. Augustus Heinze the owner of it under a contract by which he purchased it from the plaintiff, with other property, for the price of $100,000, which has been fully paid. After a hearing the temporary injunction was denied. The plaintiff has appealed.

The subjoined diagrams will serve to illustrate the contentions of the parties.

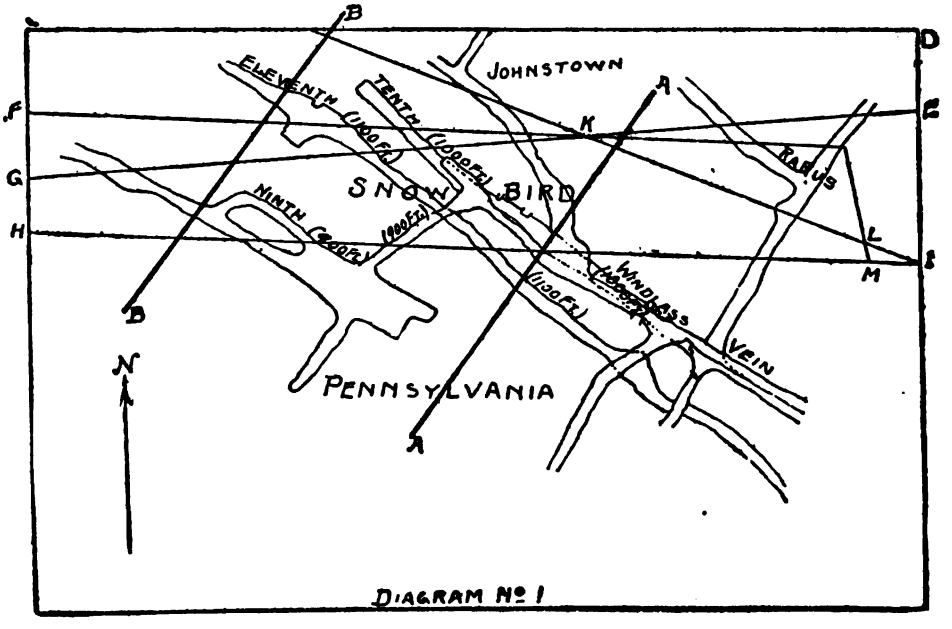
The main controversy at the hearing turned upon the question where the apex of the vein in which certain ore bodies are found is situated,—whether within the boundaries of the Snow Bird claim, or within those of the Johnstown and Rarus claims to the north, which belong to the defendants, the Johnstown Mining Company and the Montana Ore Purchasing Company. The plaintiff contended that the apex of a vein, known as the "Windlass Vein," passes through the northeastern portion of the Pennsylvania claim in the direction indicated by the words "Windlass Vein" upon diagram 1, and that this apex is also found within the perpendicular planes descending into the earth through the exterior boundaries of the Snow Bird claim.

The Snow Bird is a fractional claim, and a portion of it shown on diagram 1, is indicated by the letters G, H, K, L, M. Portions of the Johnstown and Rarus claims to the north are indicated by the letters G, C, D, I, K. The Pennsyl-

vania, to the south, belongs to the Boston & Montana Consolidated Copper & Silver Mining Company. The lines AA and BB represent, substantially, parallel fault fissures extending through the country in a northeasterly and southwesterly direction, and dipping into the earth at an angle of about 50° toward the northwest. Under the theory advanced by the plaintiff the fault occasioned by geological disturbances in the crust of the earth was attended by such a movement of the portion between the fissures as to cut off and destroy the identity and continuity of the vein to the east and west, and the Windlass vein, having its apex near the surface toward the east end line of the Pennsylvania, is cut off by the fault so that its top or apex descends into the earth under the face of the east fault fissure until it passes through the north side line of that claim into the Snow Bird, thus presenting what plaintiff claims is a subfault apex within the boundaries of the latter. AA represents the face of the east fault near the 900-foot level of the Rarus workings; BB the face of the west fault at or near the 1,000-foot level. The vein, as it descends under the east fault fissure, enters the Snow Bird ground across the line HI between the 800 and 900 foot levels, and, traversing the claim under the dip of the fault, passes into the Johnstown across the Line GK about the 1,000-foot level. The plaintiff's witnesses state that the vein is practically vertical. Let us suppose a plane passed downward through the earth in the direction of the strike and along the southeast wall of the vein fissure, and the portion of the earth toward the southwest removed. To a person facing the northeast the vein would be exposed with the various levels ending at the east fault fissure represented by the line CE on diagram 2. This is the line of the subfault apex as contended for by the plaintiff, and, if its theory is correct, it is entitled to the portion of the vein intercepted by a plane passing through the line CE (AA, diagram 1) on the strike and dip of the fault, and perpendicular planes passing downward into the earth.

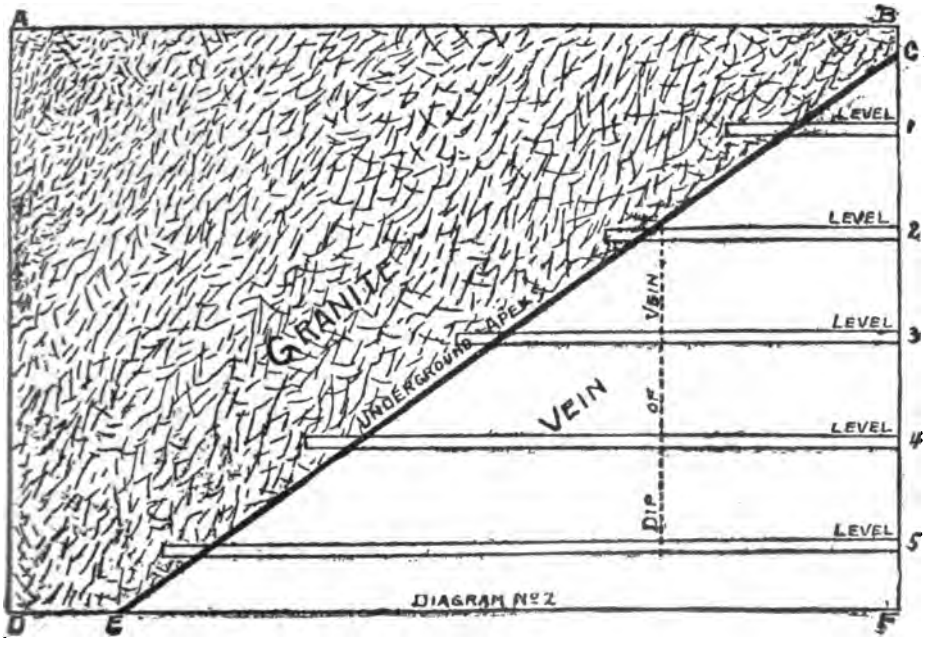
through the lines GK and HI (diagram 1). The plaintiff introduced evidence tending to sustain this contention.

The defendants contended, and produced evidence tending to show, that the so-called "Windlass Vein" has no existence in fact; that there is a vein the top or apex of which is found in the Johnstown and Rarus claims; that the vein dips to the south or southeast, and in its descent into the earth passes be-



yond the boundaries of these claims through the Snow Bird and into the Pennsylvania claim; that it has been so developed as to demonstrate its continuity from its apex to the ore bodies in question; and that the apex of the vein being so situated with reference to the end lines of the Johnstown and Rarus claims as to give extralateral rights thereon, the ore bodies belong to the defendant corporations by virtue of their ownership of the apex. While admitting that the fault runs through the country as plaintiff claims, they also produced

evidence tending to show that it does not so interrupt the vein as to destroy its continuity and identity along its strike, but that it can be readily traced entirely through the fault by substantially continuous ore bodies of a character and composition identical with that on either side of it. There is no controversy but that defendants are entitled to follow the vein which has its apex on their claim; so that, if their



contention as to its identity and continuity upon the dip and strike through the fault is well founded, they are the owners of the ores in dispute.

1. The contention is made in this court that, it being made to appear that the defendants were at the time of the hearing engaged in removing ores from beneath the surface of the plaintiff's ground, the burden was upon them to show that they are not trespassers, and that the evidence produced by

them was not sufficient to warrant a refusal of the injunction. As the order must be reversed upon other grounds, we shall not now undertake to decide where the preponderance of the evidence is, but leave the whole matter to the discretion of the district court upon the evidence which the parties may produce at another hearing. We agree with the contention of the plaintiff, however, that in such cases the burden rests upon the defendant to show that he is not a trespasser, but that he possesses a title which justifies an intrusion upon the territory of his neighbor; and, unless the evidence is reasonably clear and satisfactory that the defendant is in the right, the injunction should be granted. In such cases the doubt, if any, should always be resolved in favor of granting the writ; but granting or refusing it is so much a matter of discretion in the trial court that this court will not interfere unless there has been a manifest abuse of discretion.

2. The defendants filed in support of their contention the affidavits of George H. Robinson and others. Objection was made to them on the ground that copies of them had not been served upon counsel for plaintiff, as required by the rules of the district court. The objection was overruled, counsel excepting. It does not appear from the record what are the provisions of the rule upon which counsel rely. We are therefore unable to say whether the ruling was erroneous.

3. The affidavit of Robinson was devoted mainly to a history of a certain cause heretofore tried and determined in the district court of Silver Bow county, in which there was an issue between the defendants in this cause and the Boston & Montana Consolidated Copper & Silver Mining Company as to the ownership of the vein in controversy in this action, the cause mentioned being designated on the calendar of the district court as "Cause No. 7,337." Judgment therein was for the defendants in this action. The plaintiff herein was not a party to the action. The findings and judgment of the court therein are referred to in the affidavit of Robinson, and

made a part of it as fully as if set out therein. The other affidavits contained similar, though not such extended, references to the same matter. Objection was made to this evidence on the ground of its incompetency. The objection was overruled.

Counsel for the defendants undertake to justify this ruling of the court upon the theory that the references made to cause 7,337 and the result therein served to enlighten the court as to the issue in this cause, and furnished aid to a proper determination of the respective rights of the parties. The matter was put in the form of affidavits, counsel say, in order to avoid the necessity of "having to present, as was the case in said cause No. 7,337, ten volumes, comprising about 6,000 pages, of testimony." As we understand counsel, the affidavits were introduced for the purpose of showing that the issue before the court was the same as that in cause 7,337, and that the evidence upon which defendants based their claim of title in that controversy was the same as that upon which they would have to rely in case they took the time and trouble to establish it in the present controversy. In other words, since the court had theretofore in another action, upon an issue of title between the defendant corporations and a stranger, heard a large amount of evidence, and had reached the conclusion that the said defendants were entitled to the ore bodies in controversy, and it would be inconvenient to go into the merits of the present case and establish title against the plaintiff, the plaintiff should be bound by hearsay statements or the court's recollection of the evidence adduced in the other action, and the judgment of the court thereon. It requires no argument to demonstrate the fallacy of this reasoning. The evidence was wholly incompetent as hearsay, and the findings and judgment of the court of no binding effect whatever, except upon the parties to that action and their privies. The plaintiff was not, upon the record before us, even remotely interested in that controversy. Had the

record in 7,337 been offered, instead of the affidavits, it should have been excluded as exhibiting a *res inter alios acta,* and of no evidentiary value whatever. The statements of the witnesses made at the hearing therein could, under no circumstances, be considered for any purpose in this case, except for impeachment, and then only after the attention of the particular witness testifying had been called to the contradictory statements then made. Nor was the court at liberty, upon its recollection of the evidence in that case, to consider it in determining the rights of the plaintiff, but was bound to hear only legal evidence, offered and admitted in the regular way at the hearing, and to reach a conclusion thereon without reference to what had theretofore appeared in other controversies touching the same subject-matter between other parties. Knowledge of the issues to be tried is to be obtained from the allegations and contentions of the parties in the particular case, and not by reference to issues framed between other parties in other cases in the merits of which the parties whose rights are being tried have no interest.

4. To show equitable title to the Snow Bird claim in F. Augustus Heinze, the defendants offered, and there were admitted in evidence, certain telegrams, and a receipt for the sum of $100,000, the purchase price agreed to be paid by said Heinze for the claim, with other property, as the result of negotiations between him and J. B. Haggin, the president of the plaintiff during the year 1897. They are the following:

"New York, 10 September. Mr. Arthur P. Heinze: On deposit with the Anaconda Copper Mining Company of one hundred thousand dollars, said company will at once proceed to obtain the requisite consent of its stockholders for selling, and will then sell and convey, to F. A. Heinze, or his nominee, all its interest in the Sullivan claim, lot number two thirty-nine, and in and to the portion of the Snow Bird claim lying between the Pennsylvania, Rarus, and Johnstown claims, and east of the projection of the east end line of the St. Lawrence; and also assign any and all claims which it may

have for damages for trespass on said mines to date of said deed. Said deposit to be applied to the payment of purchase money when deed is ready for delivery. Answer. J. B. Haggin, Prest."

"New York, 14 September. F. Aug. Heinze: That is not my proposition. Money must be deposited with the Anaconda Copper Mining Co. No delay will be necessary except the legal publication, as sufficient stockholders are represented here. J. B. Haggin."

"New York, September 16th, 1897. Received of Montana Ore Purchasing Company, the sum of one hundred thousand dollars ($100,000) for deposit in pursuance of telegram to Arthur P. Heinze, dated September 10th, 1897, of J. B. Haggin, president, for the purposes stated in said telegram. [Signed] J. B. Haggin, Prest."

It was shown by other evidence that negotiations for the purchase and sale had been pending for some time; that they had been conducted for the plaintiff by said Haggin; and that the receipt was for a deposit with Haggin for the company, pending consent of the stockholders, which Haggin undertook to secure. It was shown that the signature of Haggin to the receipt is genuine; but no other foundation was laid for the introduction of the telegrams, except that it was shown that they had been received in the usual way at the office of the Western Union Telegraph Company at Butte, and delivered to F. Augustus Heinze, or his brother, Arthur P. Heinze, who was acting for him, and that F. Augustus Heinze acted upon them in making the deposit. There was also evidence tending to show that the proposed sale for the company by Haggin had been enjoined at the suit of some of the stockholders, and for that reason that it had not been consummated; also that the purchase price had been paid back to Heinze upon his depositing in its place $150,000 in first mortgage bonds of the Montana Ore Purchasing Company as security for the performance of the contract on his part in case the necessary consent of the stockholders should be obtained, and that these bonds are still in the hands of Haggin.

For present purposes we shall assume, without deciding, that the reference in the receipt to the telegram of September

10th, and the oral evidence showing that the deposit was made in pursuance and as an acceptance of the proposition therein made, would have been sufficient preliminary proof to enable the court to admit and consider the telegrams and receipt as evidence in an action brought for the purpose of charging Haggin upon a contract made by him. It will be observed, however, that the proposition made was, not that the plaintiff would convey unconditionally, but that it would convey in case it could secure the necessary consent of the stockholders at a meeting to be held for that purpose, which the president would proceed to do. Under the provisions of law in force at the time these negotiations took place, the board of directors of a mining corporation organized under the laws of this state had no authority to sell, lease, mortgage, or otherwise dispose of its real estate, nor could the board confer such authority upon an agent, whether he was an officer or other person. Sections 492 and 493 of the fifth division of the Compiled Statutes of 1887, brought forward into Civ. Code, §§ 1012, 1013, are applicable, and require any such disposition of property to be authorized by consent of stockholders owning at least two-thirds of the shares of the capital stock at a meeting called and conducted as therein directed. Unless these provisions of law are observed, a sale, lease, mortgage or other disposition of the property could not be made.

It is apparent from the telegram of September 10th that Haggin claimed no authority to act for the corporation, for he expressly states that the corporation will obtain authority in case the deposit should be made. Therefore, while he might possibly be personally liable under his undertaking to answer in damages for failure or refusal to carry it out, he did not, nor could he, bind the corporation by any promise or undertaking whatever in its behalf. Had he made an agreement in the name of the corporation, another question would be presented. As he did not, it is entirely clear that he did not,

prima facie, bind the corporation, and there being no proof of authority in him to do so, the evidence offered to show equitable title was wholly incompetent. Why the security for the purchase price has been retained does not appear. The conveyance certainly ought to be made or this should be returned. But until the necessary authority is obtained by the board of directors, neither they nor the president can execute a conveyance, nor can a specific performance by the corporation itself be enforced.

5. The plaintiff offered to introduce evidence tending to rebut defendants' evidence in chief to the effect that the vein could be traced through the fault by means of continuous ore bodies identical in composition and character with those found to the east and west of the fault and of substantial commercial value. The evidence consisted of a number of assays from samples taken from the fault matter, and tended to support the contention of the plaintiff that the fault matter consisted of country rock, which contained no mineral except such as could be found in the country rock anywhere in that locality. Upon objection this was excluded on the ground that it was a part of the plaintiff's case in chief, and not proper rebuttal.

The plaintiff's story was, as we have said, that a *prima facie* case for an injunction was made out by a showing that the defendants were engaged in removing ore from beneath the surface of the Snow Bird claim. This it attempted to do. After the defendants had gone fully into their evidence tending to establish title to the ore, basing their claim in part upon the identity and continuity of the vein through the fault matter, it was clearly competent for the plaintiff to rebut the evidence adduced in this behalf. It was, therefore, error to exclude the evidence offered, as it tended to fortify plaintiff's contention, and to rebut the claim of defendants. If, as defendants contend, the plaintiff had gone into this phase of the evidence in chief, it would ordinarily have been

within the discretion of the court to exclude further evidence upon this point; but the record discloses that it had not done so.

6. It is said by defendants that, even though the court below did commit error in admitting and in excluding evidence, the order should not be reversed on that ground, if there is sufficient competent evidence in the record to justify the refusal of the injunction. They cite *Montana Ore Purchasing Co.* v. *Butte & Boston M. Co.* 25 Mont. 427, 65 Pac. 420. There is no doubt that this case states the general rule observed by this court in equity cases where it is reasonably apparent that the error committed in the admission or exclusion of the evidence has wrought no prejudice in the result. This rule, however, has no application where the error complained of is fundamental, and it is not reasonably apparent that it did not result in prejudice. If the evidence admitted or excluded is trifling, or unimportant, as compared with the competent evidence admitted and considered, and if its exclusion or admission could not have affected the result reached, the judgment or order appealed from will not be reversed on the ground of error in admitting or excluding it. Where, however, the evidence in question is of import, and by the ruling of the court thereon it is made reasonably apparent that it was so regarded by the court, and for that reason probably affected the result reached, the judgment or order based upon it cannot be sustained. The statement made in the case cited is not properly guarded, but it must be interpreted in the light of the conditions there presented. So interpreted, it is apparent that this court did not intend to lay down the broad declaration that a judgment or order made in an equity case will never be reversed upon appeal on the ground that the trial court has erred in admitting and excluding evidence. The intention was to follow, and not overturn, the rule correctly stated in *Merchant's Nat. Bank* v. *Greenhood,* 16 Mont. 395, 41 Pac. 250, 851, which was

cited in support of the view entertained of the evidence under consideration. In that case the evidence admitted was of doubtful relevancy and materiality. It was also trifling and unimportant, and could not have affected the result. In the present case the finding of the court may have been founded entirely upon the objectionable evidence, and, were it competent, such finding would have been justified. If this had been excluded, and that admitted and considered which was improperly excluded, it is possible that the result would have been different. Under such circumstances the order must be reversed, and another hearing ordered.

Nothing said herein is to be understood as an intimation to the district court that upon another hearing, after considering all competent evidence offered by the parties, it should or should not issue an injunction; nor are we to be understood as having prejudged the alleged equitable title of defendant Heinze. Let the order be reversed, and the cause remanded.

Reversed and remanded.

TEMESCAL OIL MINING & DEVELOPMENT CO. v. JOSE JUAN SALCIDO ET AL.

(137 California 211; 69 Pac. 1010. Supreme Court. August 9, 1902.)

[1]**Sufficient location of placer quarter section.** Where one corner of the claim was also a government corner which was found in place and there was proof of placing a stake at time of original location at each corner there is sufficient proof of a location.

[2]**Where, years later, witnesses do not find the stakes,** their negative testimony after such a period, is no contradiction of the testimony as to the original staking.

An invalid attempted relocation of a mining claim does not effect an abandonment of the locator's prior valid location, and is immaterial so far as concerns another making a still later location.

Work credited to the valid claim. Work on a mining claim, done by one after making a valid location and a subsequent invalid one, will be attributed to the valid location.

Resumption after several idle years. Under Rev. St. U. S. § 2324, providing that, on failure to do a certain amount of work each year on a mining claim, the claim shall be open to relocation, provided the original locator has not resumed work on the claim after failure, and before such location, the locator, by doing work of the amount required in a certain year, after failure for some years to do work, will be treated as having resumed work.

Commissioners' decision. Department 1. Appeal from Superior Court, Ventura County; W. S. DAY, Judge.

Action by the Temescal Oil Mining & Development Company against Jose Juan Salcido and others. Judgment for defendants. Plaintiff appeals. Affirmed.

[1]A location of a placer claim on a governmental subdivision requires staking the corners the same as on unsurveyed land. *White* v. *Lee*, 17 M. R. 209. Overruled on this point, in *Kern Co.* v. *Crawford*, 143 Cal. 298; 76 Pac. 1111, but followed in *Worthen* v. *Sidway*, 72 Ark. 215; 79 S. W. 777.

[2]The subsequent obliteration of the stakes does not invalidate the location. *Book* v. *Justice Co.* 17 M. R. 617.

A party relocating a mining claim on the ground that the prior

W. A. HARRIS, BARNES & SELBY, and EDWARD M. SELBY, for appellant.

R. F. DEL VALLE, JOSEPH L. MURPHY, H. L. POPLIN, and RICHARDS & CARRIER, for respondents.

GRAY, C. This action is brought to quiet title to a certain tract of land in Ventura county, consisting of the N. ½ of the N. W. ¼ and the S. E. ¼ of the N. W. ¼ of section 12, township 4 N., range 18 W., San Bernardino M. Both parties claim the land under oil mining locations.

The case was tried with a jury, and resulted in a verdict and judgment for defendants. Plaintiff appeals from the judgment, and from an order denying its motion for a new trial.

Defendants' claim embraces the whole of the N. W. ¼ of said section 12, and was located first in 1891, and again in 1896. Plaintiff's claim was not properly located until 1900, and at the time of such location there is evidence showing that defendants had previously, in January, done the assessment work required by law for that year.

1. Appellant contends: First. That defendants' locations were not so marked upon the ground that they could be readily traced. The evidence shows that the quarter section located was surveyed out carefully by a competent surveyor employed by the locator; that the northwest corner of section 12, being the northwest corner of the quarter section constituting the location, was found by said surveyor as it had

location was not valid is not within the statute requiring the location notice of forfeited or abandoned claims to state that the whole or part of the location is made on such class of property. *Cunningham* v. *Pirrung*, (Ariz.) 80 Pac. 329.

A second locator, finding on the ground evidence of an attempted prior location, has the burden of proof to show that it was an invalid location. *Id.*

been located, and monumented with a pile of rocks by the government surveyor, that the lines of the quarter section were run, and stakes, two or three inches in diameter and standing a foot above the ground, were set at each corner. These monuments were placed in 1891, and some of them were found nine years later by the engineer who placed them; others were rotted away and gone. We think this evidence shows a substantial compliance with the provisions of the United States statutes requiring that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced." Rev. St. § 2324. We are influenced somewhat, in our consideration of the point, by the fact that the notice of location which was posted and recorded described the claim by its government subdivision, the land having already been surveyed by the government; and that a government monument was still in place at one corner of the claim at the time of the location. There is nothing in *White* v. *Lee,* 78 Cal. 593, 21 Pac. 363, 12 Am. St. Rep. 115, inconsistent with this conclusion, for in that case no attempt of any kind had been made to monument the claim, but the claimant relied solely on the government survey as sufficient to mark the boundaries of his claim.

2. There was no error in refusing the instruction offered, and based on the theory that the evidence conflicted on the question of whether there had ever been any monuments constructed on the boundaries of defendants' claim. The negative evidence of witnesses that they did not see the monuments when they looked for them some years after they were placed does not raise a substantial conflict with the testimony of the parties who placed the monuments. The witnesses who passed over the ground at times nearer the date of the placing of the stakes say that they were not looking for them. The evidence that the stakes were placed there in 1891 is not disputed, and, as against that evidence, testimony to the effect that the stakes could not be found in 1899 raises no presump-

tion. Neither is there any evidence that the claim of defendants was ever abandoned after the first location in 1891. The attempted relocation in 1896 was invalid, and did not amount to an abandonment of the previous location, and, so far as plaintiff is concerned, that location of 1896 is entirely immaterial, as its claim was not located until 1900. The work which was done by defendants in 1898, 1899, and 1900 will be attributed to the location of 1891, the only previous location which was valid.

3. There was no error in the instructions of the court calling the attention of the jury especially to the work claimed to have been done by defendants in 1899 and 1900, and in substance saying that whether they had failed in any previous year to work the claim to the value of $100 was of no great importance, "because plaintiff makes no claim to the premises at any time prior to 1899." This instruction was proper for the reason stated in it. The evidence showed, without substantial conflict, that in January, 1899, the defendants caused work to be done for the benefit of the claim of greater value than $100, and also in the following year, 1900, and before plaintiff's claim was monumented, the preponderance of the evidence shows that another $100 worth of work was done by defendants for the benefit of their claim. In the absence of any evidence to the contrary (and there seems to be none), it will be presumed that this work was all done with the honest purpose of renewing work "after failure, and before location," so as to satisfy the provisions of section 2324, Rev. St. U. S. See *Belcher M. Co.* v. *Deferrari,* 62 Cal. 160. We cannot see how the failure to do the required work in any one of the previous years would tend to show that the work of 1899 and 1900 was not done in good faith. Having done the work to the value of $100, required by statute for the year 1899, defendants must be treated as having "resumed work upon the claim," within the meaning of said section; and their previous conduct in the matter of

work could not affect their rights as against subsequent locators.

There are other objections urged to the instructions, but on examination we find them without merit, and not of sufficient importance to require special notice.

We advise that the judgment and order be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

GAROUTTE J., VAN DYKE J., HARRISON J.

UNITED STATES v. HOMESTAKE MINING CO.

(117 Federal 481. Circuit Court of Appeals, Eighth Circuit. August 25, 1902.)

[1]**Measure of damages in trespass depends on intent.** The measure of damages for the willful or intentional taking of ore or timber from the land of another without right is the enhanced value of the ore or timber when it is finally converted to the use of the trespasser. But the limit of the liability for damages of one who takes ore or timber from the land of another through inadvertence or mistake, or in the honest belief that he is acting within his legal rights, is the value of the ore in the mine or the value of the timber in the trees.

The test of the intent. The test which determines whether one was a willful or an innocent trespasser is not his violation of or compliance with the law, but his honest belief and actual intention at the time he committed the trespass, and neither a justification of his acts nor any other complete defense to them is essential to establish the fact that he was not a willful trespasser.

The fact that one acted on the advice of reputable counsel is persuasive evidence of his good faith. And one who honestly follows the erroneous advice of such counsel upon questions of legal right concerning which a layman would hardly have actual knowledge is not chargeable with bad faith, or with the willful intent to commit a wrongful act, because his counsel was mistaken on the law.

Acquiesce to affidavit makes it deposition. Parties may by stipulation, or by silent acquiescence in the introduction of evidence of the statement or affidavit of a person, waive the right and opportunity to cross-examine him, and the prescribed forms for taking and certifying his testimony; and when this is done his statement or affidavit becomes as competent evidence of the facts it details as if every formality had been observed.

Evidence to mitigate the damages is admissible under the general denial in actions for unliquidated damages for torts.

A disputable presumption may be so completely overcome by subsequent evidence in a case that it will become the duty of the court to instruct the jury that it cannot prevail.

In error to the Circuit Court of the United States for the District of South Dakota.

[1]*Durant Co.* v. *Percy Co.*, 20 M. R. 27. *St. Clair* v. *Cash M. Co.*, 18 M. R. 523.

This was an action for the conversion of lumber and cord wood cut and removed from the Black Hills forest reserve of the United States, and used by the Homestake Mining Company, a corporation, in conducting its mining operations. In its complaint the United States alleged that between September 18, 1898, and May 1, 1899, the defendant, "without any permit or authority from the secretary of the interior, or without any authority at all," willfully cut and removed from the Black Hills forest reserve in South Dakota, pine trees and wood, which it manufactured into lumber and cord wood, and then converted to its own use; that at the time and place of the conversion the lumber and cord wood were worth $10,451.06, and prayed for damages in this amount and interest. The answer of the Homestake Company consisted of a general denial of the willful cutting and removal of the trees and wood, and of the alleged value of the manufactured lumber and cord wood, and an averment that whatever timber or wood was taken by it from the Black Hills forest reserve was taken by permission and authority of the secretary of the interior. At the trial there was a stipulation that the value of the wood and timber taken in the tree was $1,757.75, while the evidence was that the manufactured lumber and cord wood were worth $10,451.06 when the defendant used them. Thereupon the court instructed the jury to return a verdict against the defendant for $1,757.75, and the judgment upon this verdict is assailed by the United States on the ground that the legal measure of the government's damages was the value of the manufactured lumber and cord wood, and not the value of the wood and timber in the trees.

JAMES D. ELLIOTT (WILLIAM G. PORTER, on the brief), for the United States.

G. C. MOODY, and CHAMBERS KELLAR (JAMES C. MOODY, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The measure of damages for the reckless, willful, or intentional taking of ore or timber from the land of another without right is the enhanced value of the ore or timber when it

is finally converted to the use of the trespasser. But the limit of the liability for damages of one who takes ore or timber from the land of another without right through inadvertence or mistake, or in the honest belief that he is acting within his legal rights, is the value of the ore in the mine or the value of the timber in the trees. *Bolles Wooden-Ware Co.* v. *U. S.*, 106 U. S. 432, 434, 27 L. Ed. 230; *Benson Mining & Smelting Co.* v. *Alta Mining & Smelting Co.*, 145 U. S. 428, 36 L. Ed. 762; *Durant Min. Co.* v. *Percy Consol. Min. Co.*, 35 C. C. A. 252, 254, 93 Fed. 166, 168; *Gentry* v. *U. S.*, 101 Fed. 51, 41 C. C. A. 185. The court below instructed the jury to apply to this case the measure for the damages resulting from an innocent trespass. Counsel for the government assail this ruling on the ground that the court should either have instructed the jury to apply the measure of the damages for a willful trespass or should have left to the jury the question whether the trespass was willful or innocent. There are many specifications of error, but the only actual question which the case presents is whether or not a verdict of a jury that in the taking of this wood and timber the defendant was a willful trespasser could have been lawfully sustained under the undisputed facts which the record presents. These are the facts: The Homestake Mining Company has been engaged in mining upon a large scale in the Black Hills of South Dakota for many years. It is necessary for it to use large quantities of wood and lumber to carry on its work in its mines. Prior to 1898 it had obtained this wood and timber from the public mineral lands of the United States under the provisions granting such corporations permission to do so found in the act of congress of June 3, 1878 (20 Stat. 88, c. 150). By the act of congress of March 3, 1891, the president had been authorized to set apart by proclamation public lands as forest reserves (26 Stat. 1091, 1093). Pursuant to this act, President Cleveland had set apart as a forest re-

serve certain tracts of land in the Black Hills of South Dakota in the vicinity of the mines of the defendant by a proclamation dated February 22, 1897 (29 Stat. 902). The effect of this proclamation had been suspended by the act of congress of June 4, 1897, until March 1, 1898 (30 Stat. 34), and that act had provided that the secretary of the interior might make rules and regulations for the sale for use in the states where they were situated, but not for export, of so much of the dead, matured, or large growth of trees upon forest reserves as might be compatible with the utilization of the forests; and that the secretary might permit, under regulations to be prescribed by him, the use within any state where any reservation was situated of timber and stone found upon such reservation free of charge by bona fide settlers, miners, and residents for their wood, fencing, building, mining, and other purposes (30 Stat. 35). The Homestake Company was actively engaged in operating its mines, and was employing many hundred men. It could not carry on its work without timber. The public mineral lands from which it expected to obtain this timber were about to be included within the Black Hills forest reserve, and, while rules for the purchase of land within those reserves had been promulgated on June 30, 1897 (24 Land Dec. Dep. Int. 589), these rules and regulations were inapplicable to the lands which were not yet included within the reserves, and it was certain that some time would be required to perfect the official machinery so that timber could be purchased under these rules from the lands about to be placed within the reserves. In this condition of affairs the attorney and the manager of the Homestake Company in South Dakota went to the city of Washington, and presented this state of the law and of the facts to the secretary of the interior and to the commissioner of the general land office in the month of January, 1898. The secretary of the interior said to the attorney for the defendant that his company might continue to cut and remove the

timber on the forest reserve for its use in the operation of its mines after the suspension of the effect of the proclamation of the president ceased in the same way that it had cut and removed timber from the public mineral lands under the act of June 3, 1878, and the rules and regulations thereunder, until rules and regulations for the sale of the timber on the Black Hills forest reserve under the act of February 22, 1897, should be adopted or made applicable to that reserve, and the price of timber thereon should be fixed; that the company might keep an accurate account of the wood and timber it should take, and that when, under the rules of the department, the price of like timber taken from the Black Hills forest reserve was fixed, the company should pay to the government for the wood and timber it took meanwhile at the same rate which that price fixed. The attorney for the defendant accepted these terms, instructed his client to comply with them, and advised the defendant that it had the right to cut wood and timber on the Black Hills forest reserve pursuant to this agreement until the rules for the purchase of timber thereon should be promulgated and made applicable thereto, and the price of wood and timber thereunder should be fixed. The superintendent and manager of the defendant in South Dakota testified that the attorney for the company advised him that the defendant had the right to cut and take timber on this reserve under the agreement of January, 1898, with the secretary; that he caused the employes of the defendant to take the wood and timber in controversy in perfect good faith, under the advice of the counsel of the company, without any idea whatever that this taking was a trespass, or an unlawful cutting; and caused an accurate account to be kept of the wood and timber that was taken. The attorney for the company testified that he gave his advice in good faith; that he believed that the secretary had full authority to make rules and regulations for the sale of the timber; that he could make such rules for the

whole public, or for one corporation, or for one man; and that he believed that the company had the right to cut and remove the wood and timber in controversy under his agreement with the secretary. This wood and timber was not cut and removed for export or sale, but was used by the defendant in operating its mines, under this arrangement of January, 1898. In the month of August, 1898, revised rules and regulations for the sale of timber on the forest reserves were adopted by the secretary of the interior. Between August, 1898, and May, 1899, this wood and timber was cut and removed. The amount of the judgment is its value at the price since fixed by the department for the sale of like wood and timber taken from adjoining lands on the Black Hills forest reserve. This price was fixed in this way: In April, 1898, the Homestake Company sent to the secretary of the interior an application to purchase wood and timber upon the Black Hills forest reserve. This application did not cover the wood and timber here in controversy. A bid of $15,000 made by the Homestake Company on October 20, 1899, under its application of April, 1898, was finally accepted by the government in November, 1899, and paid by the company, and it is at the price fixed by that bid that this judgment requires the defendant to pay for the wood and timber which it took under the agreement with the secretary of January, 1898. The land from which this wood and timber was taken was not within the Black Hills forest reserve on April 8, 1898, when the application to purchase was made, but it was subsequently included therein by an amendment of the order of reservation made in the latter part of September in that year. In October, 1900, the defendant made a written proposition to the government to pay for the wood and timber here in controversy at the same price which it had paid for the wood and timber it purchased with the $15,000. This proposition set forth the facts which have been detailed in this opinion, and is verified by the

superintendent of the mining company. This concludes the statement of the facts which condition the determination of this case, all of which are practically undisputed.

Now, the question is whether any reasonable man who reads these facts without bias or prejudice, and who exercises a fair and impartial judgment upon them, can fail to reach the conclusion that the defendant took and used the wood and timber for which this judgment has been rendered in the honest belief that it was lawfully exercising a right which it had acquired to purchase this property under the verbal agreement with the secretary of January, 1898. Counsel for the government do not dispute any of the facts which have been recited, but their chief contention is that the secretary of the interior had no power to make the verbal agreement of January, 1898; that the United States cannot be estopped from recovering the full value of the manufactured lumber and wood, or in any way affected by the misfeasance, negligence, or laches of its officers; that the application for the purchase of this timber and the application for the purchase of the other timber, which was bought for $15,000 by the defendant from the Black Hills forest reserve, were not made in accordance with the established rules of the interior department for the purchase of such property; that the defendant knew all this, because it was charged with knowledge of the law; and that it was, therefore, a willful and intentional trespasser. It is unnecessary to a determination of this case to discuss or decide the questions which the propositions which form the premises for this conclusion present, and for the purposes of this discussion the soundness of those propositions will be conceded, but not decided. The conclusion, however, which counsel deduce does not necessarily follow from their premises. Concede that the attempted sale of this timber to the defendant by the secretary in January, 1898, was not only unauthorized, but in violation of the acts of congress and of the rules promulgated thereunder, and that

the presumption is that every man knows the law. This presumption prevails everywhere, and, like the similar presumption that every man intends the natural and ordinary effect of his acts, applies to every trespasser. If either or both of these presumptions make every trespasser a willful and intentional wrongdoer, because he is chargeable with knowledge of the law, then there never has been, or never can be, a trespasser through inadvertance or mistake, or one who violates the law in the honest belief that he is acting within his legal rights; and the rule that the damages caused by such a trespasser shall be limited to the value of the wood or timber in the trees or of the ore in its bed, which was announced in *Bolles Wooden-Ware Co.* v. *U. S.* 106 U. S. 433, 434, 27 L. Ed. 230, and which has been reiterated and applied in numerous cases since, is *functus officio,* and useless, because no class or party to which it is applicable can ever be. The truth is, however, that this rule, and every other rule which measures the damages caused by trespassers, does not call the righteous, but sinners, to restitution. None of these rules have any application to those who do not violate the law. Every trespasser breaks the law, and to every trespasser the maxim applies that every man knows the law. Notwithstanding all this, the law, in its wisdom, perceives the marked difference in the heinousness of the offenses of those who recklessly, or with actual intention to rob others of their rights, trespass upon their property, and of those who trespass by mistake, and with no evil purpose, no actual, willful intent to commit a wrong; and it declares that the former class shall pay to their victims the full value of the lumber or the ore they take at the time they sell or use it, while the latter class shall be relieved from liability upon restitution of the value of the timber in the trees or of the value of the ore in the mine. The maxim that every man knows the law applies to all the members of both classes alike. It neither differentiates the classes nor their members, and

it has no more relevancy to the real question which cases of this character present than the proposition that three and three are six. That question is always based on the conceded propositions that the defendant has violated the law and that every man knows the law. The question, then, is, did the trespasser violate the law, which he constructively knew, recklessly, or with an actual intent to do so, and to take an unconscientious advantage of his victim, or did he violate it inadvertently, unintentionally, or in the honest belief that he was exercising his own right? If the former, he was a willful trespasser, and the value of the manufactured timber or the extracted ore measures his liability. If the latter, he was an innocent trespasser, and the value of the wood in the tree or of the ore in the mine is the limit of his indebtedness. The test to determine whether one was a willful or an innocent trespasser is not his violation of the law in the light of the maxim that every man knows the law, but his honest belief, and his actual intention at the time he committed the trespass; and neither a justification of the acts nor any other complete defense to them is essential to the proof that he who committed them was not a willful trespasser. *Durant Min. Co.* v. *Percy Consol. Min. Co.* 93 Fed. 166, 168, 169, 35 C. C. A. 252, 254; *Gentry* v. *U. S.* 101 Fed. 51, 54, 41 C. C. A. 185, 188; *U. S.* v. *Van Winkle* 51 C. C. A. 533, 113 Fed. 903, 905.

It is conceded that the taking of the timber from the land of the United States raised the presumption of fact that it was willfully and intentionally taken. But this is only a disputable presumption of fact, which the evidence may so completely overcome that it becomes the duty of the court to instruct the jury that it cannot prevail. *Lawson, Presump. Ev.* p. 661; *Railway Co.* v. *Bryant,* 13 C. C. A. 249, 256, 65 Fed. 969, 975, 976; *Smith* v. *Railroad Co.* 3 N. D. 17, 22, 53 N. W. 173; *Spaulding* v. *Railway Co.,* 30 Wis. 110, 123, 11 Am. Rep. 550; *Id.* 33 Wis. 582; *Huber* v. *Railway*

Co. 6 Dak. 392, 43 N. W. 819; *Koontz* v. *Navigation Co.* (Or.) 23 Pac. 820; *Railroad Co.* v. *Talbot,* 78 Ky. 621; *Railroad Co.* v. *Packwood,* (Miss.) 7 Am. & Eng. R. Cas. 584; *Railroad Co.* v. *Reese,* 85 Ala. 497, 5 South. 283, 7 Am. St. Rep. 66; *Karsen* v. *Railway Co.* 29 Minn. 14, 11 N. W. 122. In the jurisdiction in which this action was tried "good faith consists in an honest intention to abstain from taking an unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious." Comp. Laws Dak. 1887, § 4739; *Thompson* v. *Bank,* 150 U. S. 231, 240. Where is the evidence of any attempt on the part of this defendant to obtain any unconscientious advantage of the United States by the taking and use of this timber? There was no attempt to take it secretly, furtively, or forcibly. Willful trespassers rarely go to their victims, ask their permission to take their property, agree to pay for it, notify them that they intend to take it under their assumed permission, and then openly proceed for months to carry out their supposed agreement. The mere fact that the attorney of this corporation notified the secretary of the interior that it was necessary to the prosecution of the business of his client that it should take timber from the forest reserve, and that he sought to buy and pay for it in behalf of the defendant, is very persuasive evidence of an honest purpose and a right intent. If the defendant sought an unconscientious advantage, why did it give notice beforehand of its intention to cut and remove this timber to a nation able to prohibit in advance or to stop it at any time?

Where is the evidence that this defendant believed that it had no right to take this timber when it removed it, or that it had any actual intention to obtain an unconscientious advantage of the government when it committed the trespass? It is said that this timber was cut and removed long after

the temporary agreement with the secretary had expired, that this arrangement was to continue only until the rules were promulgated so that the price of the timber could be fixed, that the revised rules were announced in August, 1898, that this trespass did not commence until September, 1898, that it continued for six months, that no attempt was made to fix the price by any application to purchase this timber under the rules which the secretary had promulgated, and that these facts constitute substantial evidence of bad faith and of a willful trespass. But in January, and again in April, 1898, this defendant applied to purchase wood and timber upon the lands which now constitute the Black Hills forest reserve. The application which it made in April, 1898, seems to have remained pending until November, 1899, when for the first time the defendant succeeded in getting a price fixed for wood and timber upon this reserve. Thereupon it paid to the government $15,000 for wood and timber upon land contiguous to that from which this was removed, and offered to pay at the same rate for that which is now in controversy. The facts upon which the government relies to prove the bad faith and evil intent of the defendant lose all their persuasiveness in that direction when the further facts to which we have adverted are considered. It could have served no good purpose for the defendant to have filed other applications to purchase other timber when it was unable to get any price fixed by means of the application which it had already made. When this trespass was committed counsel for the defendant had applied to the secretary of the interior, who had power to make rules and regulations for the sale of and authority to sell this wood and timber, for permission to cut, remove, and pay for it. He had obtained that permission. It is conceded that the secretary had no power to grant this license, and that his action and that of counsel for the defendant were in violation of the acts of congress and of the rules of the department. But counsel for

the defendant believed, and he advised his client, that this action of the secretary gave it the right to cut and use this wood and timber. The superintendent of the company believed, accepted, and acted on this advice of its counsel, caused the defendant to cut and use the timber, as he says, "in perfect good faith, without any idea whatever of its being a trespass or an unlawful cutting." The counsel of the defendant was reputable and eminent. The error in his advice, if there was one, was not so plain that a layman could be fairly charged with knowledge of its existence, and the fact that the defendant committed this trespass under the advice of reputable counsel that it was acting within its legal rights goes far to establish its good faith, and to disprove the claim of the government that it ever intended or was attempting to secure an unconscientious advantage by cutting and using the timber. One who acts in good faith upon the erroneous advice of reputable counsel upon questions of legal right concerning which a layman could hardly have actual knowledge, is not chargeable with bad faith, or with a willful intent to commit a wrongful act because his counsel was mistaken in his view of the law. *Selden* v. *Cashman,* 20 Cal. 57, 81 Am. Dec. 93; *Abbott* v. *Water Co.* (Cal.) 37 Pac. 527.

The state of the law and of the facts when the verbal agreement of January, 1898, was made between the secretary of the interior and the counsel for the defendant, the fact that the defendant had for years been taking timber from the public lands under the rules promulgated by the secretary, the unsettled condition of the Black Hills forest reserve, the publicity which the defendant gave to its intention to take timber from it months before this timber was cut, and the undisputed facts that counsel for the defendant believed and advised his client that it had the right to take this property, and that the client believed and acted on this advice without any idea that its taking constituted any trespass or unlawful

cutting, leave no room for the argument that any reasonable man could fairly draw from the facts in this record the conclusion that this was a willful trespass, and no doubt that the charge of the court that the government was limited to a recovery of the value of the wood and timber in the trees was right.

The other questions raised by this record relate to the admission of evidence, and are of a minor character. All the evidence which the defendant offered was received over the objections of the plaintiff that it did not justify the trespass because the agreement with the secretary was unauthorized, and violative of the law, and that the fact that the defendant had taken the wood and timber in good faith in the honest belief that it had the right to do so was not pleaded in the answer. A justification of the taking of the timber or ore is requisite to a complete defense of the act. But, as we have seen, it is not essential to that good faith and innocence of intentional wrong which will limit the damages to the value of the property taken in its original place, so that the objection that the evidence did not disclose a legal right in the defendant to take the timber was properly overruled.

The objection to the evidence of innocence and good faith that they were not pleaded by the defendant raises an interesting question. But there are two reasons why this judgment ought not to be reversed because that objection was overruled. In the first place, proof of every fact essential to establish the good faith of the defendant and its honest belief that it had the legal right to take and use this wood and timber was made without objection while the government was introducing its evidence in chief, and this proof stands uncontradicted. In proving its case the United States offered in evidence that part of the affidavit of the superintendent of the defendant which stated the amount and character of the timber cut. The defendant at the same time offered the remainder of this affidavit, and it was admitted in evidence

without objection. The affidavit set forth the agreement, with the secretary, of January, 1898, the advice of counsel for the defendant, the cutting and use of the wood and timber under that advice, the belief of the defendant that it had the right to take and use this timber under the agreement of January, 1898, and every fact material to establish the innocence and good faith of the company. An insuperable objection might have been made to the introduction of this affidavit on the ground that no opportunity had been given to the plaintiff to cross-examine the person who verified it, and on the ground that his testimony had not been so taken and returned as to make it competent evidence. But no such objection was interposed, and the affidavit thus admitted in evidence without objection became uncontradicted evidence of the facts which it detailed. Forms and rules are prescribed by statutes, courts, and decisions for the taking and production of testimony which give to the opposing party the right and the opportunity of cross-examination and the security of an oath. But this right, this opportunity, and this security may be waived by stipulation for, consent to, or silent acquiescence in the introduction of testimony; and when this is done the statement or affidavit admitted becomes as competent evidence of the facts it details as though every formality had been complied with. *Walton* v. *Railway Co.* 56 Fed. 1006, 1008; *National Loan & Investment Co.* v. *Rockland Co.* 94 Fed. 335, 337. The plaintiff had alleged in its complaint that the defendant had "willfully, knowingly, and without any permit or authority from the secretary of the interior, and without any authority or permit whatsoever or at all," cut the timber and converted the lumber. Proof of a willful trespass was essential to its recovery of the value of the manufactured lumber and wood, even in the absence of an answer, for this was an action of tort for unliquidated damages. When the government rested its case,

the legal presumption of a willful trespass which might have arisen from the unexplained cutting and removal of the timber by the defendant was completely overcome by the uncontradicted statements of the affidavit of the superintendent of the defendant, and the damages which the government was entitled to receive were as conclusively limited to the value of the wood and timber in the trees as they were at the conclusion of the trial. In other words, the proof of the fact that the trespass was not wilful, that it was not committed with an intention to do a wrong or to take an unconscientious advantage of the government, but that the defendant took and used the timber in operating its mines in the honest belief that it had a legal right to do so under its agreement with the secretary, was plenary when the government rested its case, and before the defendant offered any of the testimony to the introduction of which exceptions have been taken. It necessarily follows that, even if the testimony which was received over objections was erroneously admitted because the answer failed to plead the good faith of the defendant, the plaintiff was not prejudiced by its reception, and this judgment should not be reversed on account of its introduction because the court would have been compelled to have directed the same verdict and judgment in the absence of this testimony, and error without prejudice is no ground for reversal.

In the second place, inasmuch as in actions for unliquidated damages for torts the plaintiff is required to prove his damages in the absence of any answer or denial, and the defendant generally has the right to cross-examine the plaintiff's witnesses, and to introduce evidence to mitigate or reduce the damages claimed (10 Enc. Pl. & Prac. p. 1156; *Parker* v. *Smith,* 64 N. C. 291, 292; *Bridges* v. *Stephenson,* 10 Ill. App. 369, 371; *Railroad Co.* v. *Holbrook* 72 Ill. 419, 422; *Briggs* v. *Sneghan,* 45 Ind. 14, 24; *Lane* v. *Gilbert,* 9 How. Prac. 150, 152), the interposition of an answer which

contains a general denial or a justification does not deprive the defendant of this right. A defendant in an action to recover unliquidated damages for a tort may generally introduce evidence in mitigation of damages, except in actions for slander or libel, under a general denial in his answer; and there was no error in the admission of the defendant's evidence of innocence and good faith to mitigate the damages claimed by the government under the general denial and the justification pleaded in the answer of this defendant. *U. S.* v. *Van Winkle,* 113 Fed. 903, 905; *Booth* v. *Powers,* 56 N. Y. 22, 33; *Harter* v. *Crill,* 33 Barb. 283, 285; *Thompson* v. *Halbert,* (N. Y.) 16 N. E. 675; *Gentry* v. *U. S.* 101 Fed. 51, 54.

Numerous errors are assigned to the rulings of the court admitting various items of the defendant's evidence, such as the application to purchase the timber. But these alleged errors are not separately argued, and have lost all their materiality in view of the conclusions which have already been reached. Moreover, the only objection to these various items of evidence which has not been already considered is that they did not tend to show the good faith of the defendant, and that objection is not tenable. Where the good faith or the intent of a party in a given transaction is open to investigation, considerable latitude should be permitted in the introduction of evidence of the acts and sayings of the person whose intent is in question relative to the transaction in issue. The application of the defendant to purchase other wood and timber upon land in this reservation contiguous to that from which this was taken and the other items of evidence to which objection has been made all tended to establish the purpose and intent of the defendant in pursuing the course of action which it adopted and in taking the wood and timber here in controversy. There was no material error in the rulings of the court in the admission of this evidence; and, if there had been, it would not have been prejudicial to

the government, because the fact that the trespass was not willful was conclusively established without this evidence.

There is no substantial ground upon which this judgment can be reversed, and it is affirmed.

JOHN KINCAID ET AL. v. THOMAS PRICE ET AL.

(18 Colorado Appeals 73; 70 Pac. 153. Court of Appeals. September 8, 1902.)

The measure of damages for breach of a contract to buy the output of a coal mine is, in the absence of proof that the coal has no market value, the difference between the market value and the contract price.

Appeal from District Court, Fremont County.

Action by Thomas Price and others against John Kincaid and others for breach of contract. From a judgment for plaintiffs, defendants appeal. Reversed.

CHARLES E. WALDO and CLYDE C. DAWSON, for appellants.

A. MACON and JOS. H. MAUPIN, for appellees.

GUNTER, J. Plaintiffs agreed to sell and deliver defendants the output—with an immaterial exception—of their coal mine, which defendants were to accept and pay for at a stipulated price; the coal to be merchantable lump and nut; contract to run for two years. The gist of the contract was, plaintiffs to sell and deliver, and defendants to accept and pay for, certain coal. After receiving coal about four months, defendants declined to take further. Plaintiffs claimed a breach of the contract, and sued for damages. Defendants,

Measure of damages on breach of contract to deliver ore, the difference between contract price and market value. *Duluth Co.* v. *Iron Belt Co.* 117 Fed. 138.

On fraudulent sale of mining stock. *Warner* v. *Benjamin*, 89 Wis. 290; 62 N. W. 179. *Rockefeller* v. *Merritt*, 76 Fed. 909.

Measure of damages on failure to furnish coal cars. *Cons. C. Co.* v. *Schneider*, 163 Ill. 393; 45 N. E. 126.

among other defenses, denied that plaintiffs had sustained damage. Verdict and judgment were for plaintiffs. Defendants appealed.

On trial, this instruction was given:

"If the jury shall find in this case a verdict in favor of the plaintiffs, the measure of their damages is the amount of coal of the quality and character provided for in the contract which they were able, ready, and willing to produce and furnish to the defendants during the term of the existence of said contract, operating their mine in the ordinary and usual way in which properties of that sort are commonly operated, over and above enough of such coal to supply the demand of the local market; also over and above the amount of such coal which plaintiffs did or might, with the exercise of reasonable good faith and diligence have sold to other parties at a price equal to that named in the contract. If, under this instruction, you shall find that the plaintiffs were thus able, ready, and willing to furnish any amount of coal under the contract to the defendants, the difference between the contract price therefor and the cost of producing the same (that is, the cost of producing the particular coal which was to be furnished under the contract) will be the measure of damages which the plaintiffs have sustained, if any, by reason of the defendants' violation of the contract herein sued upon."

Defendants (appellants) contend that the general rule for measuring damages in actions therefor upon breach of an executory contract, as this, is the difference between the market value of the article contracted to be delivered, and the price agreed to be paid therefor; that to justify another rule, it should appear from the evidence that the article covered by the contract had no market value; that in this case the court erred in assuming that the article in question had no market value, and in departing from the general rule for measuring damages in like cases.

It is and ought to be the intent of the law, in cases such as this, to indemnify the parties injured for damages sustained by the breach, but this should be done without unnecessary prejudice to defendants. Further, it is the duty of the party

injured to make every reasonable effort to avert damage from the breach.

"The statement that the fundamental principle of the law of damages is complete compensation to the party injured seems to ignore, in terms, at least, just consideration of the rights of the party sought to be held responsible for the damages suffered. It has been declared, however, that the rules of law respecting the recovery of damages must be applied with reference to the just rights of both parties—not merely what it might be right for an injured party to receive to afford compensation for his injury, but also what it is just to compel the other party to pay." 8 Am. & Eng. Enc. Law (2d Ed.) 546.

"As has already been seen, compensation is the basic principle of the law of damages; the measure thereof being limited and controlled, and the elements of recovery primarily determined, by this fundamental consideration. All the rules which have been laid down and applied by the courts in this connection have been formulated and adopted with the view of compensating in money a party injured by the wrong of another as fully as a just consideration of the rights of the latter will permit." *Id.* 627, 632. "The party who is exposed to loss by the violation of the contract by another party must exert himself to make the damages as light as possible. The law imposes this active duty upon him." *Dolph* v. *Machinery Co.* (C. C.) 28 Fed. 553, 558. "The law imposes upon the party injured by another's breach of contract or tort the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible." 1 Suth. Dam. (2d Ed.) § 88; 2 Suth. Dam. § 648. "It is the market price, when there is one, at the date of the breach, which governs in the estimate of damages." *Id.* § 652. "Where the general rule concerning the market price applies, the jury cannot give damages in excess of it. * * *" *Id.*

If the plaintiffs in the present case, by making a reasonable effort, could have sold the output of their mine in the market at a price above the cost of production, then they sustained no greater damages than the difference between such market price and the price at which defendants contracted to take the coal, and no greater damages should have been awarded them. By the application of such a rule to the damages recoverable by plaintiffs herein, they would have been fully compensated for the loss through the breach of the contract by defendants, and yet have imposed upon defendants no unnecessary burden. Such should have been the rule given by the trial court for measuring the alleged damages of plaintiffs, unless it appeared from the evidence that the coal contracted for had no market value. Whether it had such value was a question of fact for the jury. The rule laid down by the trial court, while it might work full compensation to plaintiffs, might do more, and, in doing so, impose an unnecessary burden upon defendants; that is, cause them to pay more than was necessary to compensate plaintiffs for the loss. The court charged the jury that plaintiffs should recover the difference between the cost of production of the coal and the price at which the defendants agreed to take it. There was evidence that this difference was about 66 cents per ton. There was evidence that the coal could have been sold in open market for about 25 cents above its cost of production. If such facts were true, plaintiffs could have saved themselves 25 cents per ton of the damages sustained through the breach of the contract, and have saved defendants in like amount. If they could have done so, their alleged damages should have been abated accordingly. Under the instruction given, plaintiffs could have recovered from defendants the difference between the cost of production and the contract price of the coal; and, as the plaintiffs retained the coal, they could thereafter mine and sell the same at 25 cents per ton more than the cost of production, and thus, through their

judgment and the proceeds of the sale of the coal, be more than compensated for the damages sustained by the breach of the contract. Such is not the intent of the law.

Before the court in this case laid down any other rule for the measure of damages than the difference between the contract price and the market value at the time of the breach, it should have appeared from the evidence that there was no market value. This reasonable conclusion is sustained by the authorities. In *Todd* v. *Gamble* (Sup.) 21 N. Y. Supp. 739, plaintiffs, engaged in the manufacture of silicate of soda, contracted to sell defendants, and defendants agreed to receive and pay for, all the silicate of soda which defendants should use in their business. Defendants declined to receive the soda. Plaintiffs sued for damages. Therein the court said: "In this case the court ruled that the measure of the defendants' liability was the difference between the contract price and the cost of production. * * * The defendants requested the court to rule and charge that the burden was on the plaintiffs to show that the silicate of soda had no market value, before evidence of the cost of production could be received or considered by the jury, which was also refused, and an exception taken. * * * The burden was on plaintiffs to show that the article had no market value, and, under the state of the evidence disclosed by the record, whether it had or had not such a value was a question of fact for the jury, and not one of law for the court. In *Paving Co.* v. *Howell,* 7 N. Y. St. Rep. 494, damages were sought to be recovered from a vendee for refusing to accept paving granite. The plaintiffs insisted that the actual value of the goods was to be ascertained by proving the cost of production, while the defendants contended that their market value was proof of actual value. The trial court held, as a matter of law, that the granite had no market value, and refused to submit that question, as one of fact, to the jury, which was held to be error." This case was again

considered in 26 N. Y. Supp. 662, and in 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225. The doctrine, however, announced in 21 N. Y. Supp., *supra,* was unmodified. See, also, Benj. Sales (7th Am. Ed.) p. 793, note; also *Dolph* v. *Machinery Co. supra,* wherein it is said: "The error of the instructions in the present case consists in adopting these expressions literally, and applying them to a case where the difference between the cost price and the contract price would exceed the plaintiff's actual prospective loss, and allow him more than complete indemnity for the breach of the contract by the defendant. In the cases where damages have been sanctioned upon the basis of the difference between the contract price and the actual cost to the plaintiff of performance of the contract, there was no other criterion for ascertaining the extent of the plaintiff's prospective loss." Where a different rule than the difference between the market value and the contract price has been adopted, the article involved has had no market value, and the absence of a market value is the reason announced for departing the general rule. This was true in the leading case of *Masterton* v. *Mayor, etc.* 7 Hill, 69, 42 Am. Dec. 38. See comments thereon in *Dolph* v. *Machinery Co. supra.* In *Silkstone & D. Coal & Iron Co.* v. *Joint Stock Coal Co.* 35 Law T. (N. S.) 668, plaintiff contracted to deliver defendant coal. Defendant declined to receive. In an action for damages, as it appeared there was no market value for that particular kind of coal at the mouth of the shaft, the place of delivery, the court laid down as a rule for measuring damages the difference between the amount of the expenditure of plaintiff in raising the coal, added to the value of the coal had it remained unraised and unsold in the mine, and the contract price per ton which the plaintiff would have received for the coal had the contract been duly performed. There was no evidence in the present case that the coal involved was without market value. There was positive evidence that it had such value. The court

erred in assuming that it had no market value, and in adopting any other rule for measuring the damages than the difference between the contract price and the market value at the time of the breach, in the absence of it having been shown and the jury having found that the coal was without market value. If the coal contracted to be delivered was without market value, then it was incumbent upon the court to adopt some other rule than the difference between the market value and the contract price for measuring the damages which would compensate plaintiffs for their alleged loss, and yet would impose upon defendants no unnecessary burden, observing the requirement that plaintiff should make every reasonable effort to escape injury from the alleged violation of the contract.

The judgment should be reversed.

Reversed.

McCann v. Wallace.

(117 Federal 936. Circuit Court, District of Oregon. Sept. 12, 1902.)

Want of equity in suit to enjoin placer ditch. Where the tail of defendant's mining ditch crossed plaintiff's land, who complained of overflow and debris but refused to allow defendant to build levees at his own expense to prevent all damage, and had allowed defendant without objection to make large expenditures in securing the water, the plaintiff has no case for an injunction.

In Equity. Suit for injunction. On final hearing.

Wm. M. Colvig and George H. Durham, for complainant.

Robert G. Smith and Williams, Wood & Linthicum, for defendants.

Where a number of lots were conveyed with a covenant in each deed not to sink gas wells, a lot owner will not be enjoined where it is shown that the grantor himself has driven a well on an unsold lot in violation of the spirit of the contract which intended that no wells at all should be sunk. *Acheson's App.* 130 Pa. 633; 18 Atl. 873.

A preliminary injunction will not be granted where, upon the same proof, final relief would be denied. *International Co.* v. *Mills*, 22 Fed. 659.

A motion for a temporary injunction is not designed for the adjudication of a doubtful question. *Gold Tel. Co.* v. *Commercial Tel. Co.* 22 Fed. 838.

Plaintiff cannot have, when defendant has never worked or threatened to work. *Champion Co.* v. *Wyoming Co.* 16 M. R. 145.

The owner of a coal mine with a lease of the surface to get at his coal will not, at the suit of the surface owner, be enjoined from carriage of coal from other lands across such surface. *Cons. Coal Co.* v. *Schmisseur*, 135 Ill. 371; 25 N. E. 795.

Stream pollution by an iron company will not be enjoined where the injury to the public from the grant of the writ is considered as well as the loss to complainant. *Clifton Iron Co.* v. *Dye*, 87 Ala. 468; 6 So. 192.

BELLINGER, District Judge. This is a suit to restrain the defendant, in the operation of a placer mine, from damaging plaintiff by flowing water over his land and depositing mining debris or slickens thereon. Since the commencement of the suit the mine complained of has been sold to the Althouse Mining Company, and the company is in fact the real party in interest.

The water used in the operation of the mine in question is taken from Althouse creek by means of a tunnel through a divide that separates the waters of that creek from Democrat creek. The amount of water so taken is some 2,000 inches, miners' measurement. Below the mine defendant has built a slum dam 216 feet long. This dam is built by driving piling, six feet apart, and planking the same on the inside with a 2-inch plank, 12 feet long, put down close. The piles are from 10 to 12 inches in diameter and 20 feet long. They are driven in the ground so that they protrude above it 10 feet. The water flowing over this dam spreads over a flat thickly covered with willows to a width of some 300 or 400 feet for a distance of from 800 to 1,000 feet, where it is taken up by Democrat creek or gulch, a part of it by means of an intersecting ditch. The point where this overflow reaches

Injunction against flume dissolved on account of plaintiff's wilful standing by and allowing expenditures. *Klein* v. *Davis*, 11 Mont. 155; 27 Pac. 511.

Tunnel threatening to cut off water tapped by another tunnel not enjoined. *Williams* v. *Ladew*, 161 Pa. 283; 29 Atl. 54.

Tunnel underneath ditch, not enjoined. *Lorenz* v. *Waldron*, 96 Cal. 243; 31 Pac. 54.

The operation of a railroad for carriage of ores will not be enjoined in aid of a bare legal right. *Booker* v. *Browning*, 169 Pa. 18; 32 Atl. 85.

Not allowed against pipe line crossing barren surface. *Crescent Co.* v. *Silver King Co.* 17 Utah 444; 54 Pac. 244.

A state court will not interfere with process of a federal court in injunction proceedings, and a preliminary injunction having such effect, though issued, was void. *Johnstown M. Co.* v. *Morse*, 90 N. Y. S. 107; 91 N. Y. S. 586.

Democrat creek is about half a mile above plaintiff's land. This creek, or gulch, runs on a line, straight or nearly so, through plaintiff's land for a distance of about a mile. This ditch is artificially made, and is higher than some of the adjacent land. It has a fall of some 14 or 16 feet in going through the land in question. One of plaintiff's witnesses testifying from actual measurement, gives the width of Democrat gulch through plaintiff's premises at from 10 to 11½ feet, and the depth at from 3 to 5 feet. It is intersected by Mulvaney's gulch a little below the center of plaintiff's tract. This gulch is used mainly as an irrigating ditch. In high water it carries as much or more water than Democrat creek. Defendant's mine was first operated by water from Althouse three years ago. Prior to that time for many years mining operations had been carried on on a small scale above plaintiff's farm, and the debris carried into Democrat gulch. Probably the extent of such mining altogether was about equal to that done by the defendant in the three years that the mine complained of has been in operation.

Plaintiff's land consists of 425 acres, of which he owned 320 acres at the commencement of this suit. Something over 200 acres is what would be called level land, over half of which has been cleared. The remainder is brush land, that has once been cleared, but has grown up again with brush. Of the land in cultivation, 50 acres are devoted to raising timothy hay, 15 to alfalfa, 4 to natural grass, and from 15 to 25 to wheat, oats, barley, and potatoes. This land lies on either side of Democrat gulch. Plaintiff testifies that it is pretty good land, and that he paid $3,500 for it 11 years ago. There is testimony tending to prove that its present value is about $10,000.

The complaint is that mining debris is carried in the water from defendant's mine, and is filling up the channel of Democrat gulch so that it is being carried over the sides of such channel and deposited on plaintiff's land, and that the water

flowing from the mine into Democrat gulch is more than the channel can carry, and as a result it spreads out over plaintiff's meadow and other land, rendering them boggy and unproductive and impossible of cultivation. Plaintiff testifies that when the creek is full of water it overflows his land on the north side out from the creek for a distance of four or five hundred yards, covering 25 acres of meadow; that on the other side the overflow will extend about 300 yards; that when the mine tunnel is run full of water his land subirrigates, and is so wet that he cannot plow it, and sour grass comes up on the meadow where the water stands; that the mine is usually operated from about the middle of November to the 1st of May; that the deposit on the land is sand and slickens; that since the mine has been operated this deposit has accumulated to an average depth of from 1 to 8 inches, and that the land so affected comprises 8 or 10 acres. On cross-examination, in answer to the question, "You say 25 acres are covered with slickens?" the plaintiff answered, "Yes." In fact he had not so stated. What he had stated was that on one side of the ditch 25 acres had been flooded with water. Further on in his cross-examination he testified that about 5½ acres are covered from 8 to 15 inches deep, and that the rest of the 25 acres have "little rises in spots." He further testified on his cross-examination as follows: "How much of that (the meadow) is covered with them (slickens)? A. Nearly all covered where the water went through. Q. Covered with slickens? A. Six, eight, or ten acres." The witness explains that this refers to the timothy meadow. He testifies that there are four acres of natural grass land affected, and something "over an acre on the other side"—a total of from 10 to 15 acres; that he cleared the brush out of the channel of Democrat creek and repaired the banks; that since the operation of the mine the banks of the channel have been flooded off and the levee built by him washed out, and the work of keeping the channel in repair

increased to the amount of $40 or $50 a year; that it is not possible to control the flow of water through this channel when the mine is being operated; that the debris fills up the channel, and when this is cleared out it will fill up again in two days.

Patton, a brother-in-law of plaintiff, and Maurer, a neighbor, testify that between 15 and 25 acres of plaintiff's land have been affected by debris. Croxton, another witness for plaintiff, places the amount of land affected at 10 or 15 acres. Carson testifies that between 30 and 40 acres are affected, and that the debris will eventually destroy the land entirely. This witness produced samples of slickens taken from plaintiff's land. He has debris litigation himself, and came from Grant's Pass, some 35 or 40 miles distant, where he resides, for the purpose of examining plaintiff's land so as to testify as a witness. Lovelace testifies that there was quite a territory of it, land flowed over, with debris. Morey, a witness for plaintiff, testifies that "there have been several acres of McCann's land" covered more or less with fine gravel and sediment. George, another witness for plaintiff, testifies that the value of plaintiff's land is from $8,000 to $10,000, and that the continued operation of the mine is liable to do the land great damage. One of defendant's witnesses, J. E. Holland, testifies that he examined plaintiff's land; that he saw a little sediment or sand, not enough to amount to anything; saw some slickens; but that the operation of the mine will be some damage to plaintiff's land. On the other hand, 12 witnesses, farmers, miners and others, without interest in the controversy, testify in effect that there are no slickens or other debris upon plaintiff's land in quantities to injure or affect it. Thirteen other witnesses, who are, with two exceptions (one that of a small stockholder and the other that of Mr. Rourke, who owns a mine on Althouse), miners in the company's employment, testify to the same thing. There is also testimony to the effect that neither the ground worked

by defendant, nor that of the Rourke mine on Althouse, from which stream the water used in defendant's mine is taken, contains slickens, or the clay from which they are produced, in any considerable quantity.

Witnesses for both parties testify to the existence of a break in the ditch or channel of Democrat creek on the south side, some 19 feet in width, through which water was pouring on the day the witnesses examined the land as to its condition.

Several of the witnesses for the defendant testified to a particular examination of the channel of the creek with reference to any deposit of sand or slickens therein, and these witnesses testify that the ditch or channel was clean; that there was no accumulation of sediment of any kind. Such testimony is free from the difficulty that attends opinion evidence. Witnesses are not likely to be mistaken about a fact so palpable and easily known; and it is a safe assumption in the case that the flow of the water in the channel of Democrat gulch is not impeded by deposits or debris from the mine, and, if not, there ought to be little trouble in maintaining a channel that will carry the flow of water from the mine at all times, except during periods of flood, and at such times it appears that the mine is not operated. The superintendent of the mine testifies that a ditch eight feet wide and five feet deep, with a grade of three-fifths of an inch to the mile, will carry about 9,000 inches of water, miners' measurement,—four and one-half times as much water as defendant's mine uses. This is a fact which admits of exact information; the formula for this measurement is given, and there is no dispute about it. Hansen, the former owner of defendant's mine, testifies that, when there is no storm, Democrat creek carries about 25 inches of water. The plaintiff testifies that he has seen it with as much water as comes through the defendant's tunnel. This was presumably during extreme high water. The creek rises and falls suddenly. It will fall from the freshet stage to ordinary water in "a day or two." The present

dimensions of the creek through plaintiff's place, according to his testimony, are as follows: Width 10 feet, average depth 2½ feet. George, a witness for plaintiff, called to testify to the dimensions of the channel from measurements made by him, gives the narrowest measurement at 10 feet and the minimum depth at 3 feet. From these dimensions there can be no question but that the ditch, when in repair, will carry the water used in the mine and the creek water during ordinary winter stages. According to King, the superintendent of the mine, the grade of this ditch is as great as is desirable in ditches of that size.

While there will be subirrigation from such a ditch, yet I am convinced that the flooding complained of is not the result of subirrigation, but of breaks in the ditch through want of repair. It is a matter of common knowledge that mining and irrigating ditches are successfully maintained in Southern Oregon and Northern California, and that they are common throughout that region. It is in itself extremely improbable that plaintiff's farm is so exceptional in its character that water cannot be carried through it by means of a ditch. During March and April, and earlier, at the time the witnesses in the case examined this farm, much water was running out of Democrat gulch through a sluice in the side of the channel already mentioned. This break could have been easily repaired. The wet and boggy condition of the adjacent land, if it was in that condition, indicated nothing as to the extent of subirrigation from the broken ditch.

Before starting the mine, the superintendent offered to levee all the low places on plaintiff's land so that the water could not get out of the ditch, and offered to pay $50 per acre for the land occupied by the ditch, but both these offers were refused, and the plaintiff testifies that he would not permit the defendant to repair the ditch through his land. The question which elicited this answer was objected to by his attorney upon the ground, among others, that such permission. if

granted, would enable the defendant in the course of time to acquire a right to do so. The plaintiff afterwards, in answer to a question, said that if the defendant should waive any right acquired by such permission, still he would not allow the defendant to make repairs. Thereafter he testified that the reason why he would not permit such repairs or other work along the creek by defendant was that the defendant's mine "has such a very large water power that they themselves cannot control it at times." Neither of these reasons is a reason. A right that is exercised in plaintiff's interest and for his protection can never be adverse; and if there is anything to justify an opinion that the 2,000 inches of water employed by the mine, added to the usual flow in Democrat gulch, with the mine shut down in periods of freshet, would at times get beyond defendant's control, the plaintiff could not be injured by such control as it is possible for defendant to keep under the circumstances. And, as already appears, if Democrat gulch is put in a state of good repair, it will take care of the water which it is required to carry, without injury to plaintiff. The attitude of plaintiff is uncompromising. It involves the destruction of the defendant's mining property, representing an investment of more than $30,000. He saw the work of building the tunnel by defendant, through which the water to be used in the mine was to be brought from Althouse creek, go on at great expense, and said nothing until the work was completed, and thereupon he appeared with a witness and forbade the operation of the mine. He now says that he thought that a dredge was to be used, and that this water would not be turned into Democrat gulch. After having delayed making objection until the defendant's position became irretrievable, he ought to be willing now to give the defendant the opportunity to repair, and, if it so desires, improve Democrat gulch, so that it may be known from actual experience whether the injury complained of is irremediable. When the truth is demonstrable, why should

the matter be left to the conflicting opinions of witnesses? Enough is shown to make it reasonably certain that Democrat gulch, 10 feet in width and 3 feet deep, with a minimum grade of between 7 and 8 feet in a half mile, will carry the water coming from defendant's mine and the water otherwise ordinarily flowing therein, and it is unlikely that there will be any such subirrigation as will flood the adjacent lands in the way complained of.

The preponderance of the evidence from inspection of the ground is against the claim of injury and damage. But without this, the refusal of the plaintiff to permit the defendant to build levees along the ditch, to improve and keep it in repair, is unreasonable. His demand that the operation of the mine shall be enjoined, as the only measure of relief with which he will be satisfied, is under the circumstances inequitable. This court cannot thus destroy the defendant's property unless there is imperative necessity therefor. If, the opportunity being offered, the defendant refuses to build necessary levees along the ditch, or refuses to maintain the ditch in a state of repair, or, having done so, if these measures are inadequate to prevent injury and damage to the plaintiff, it may then become the duty of the court to grant such relief as is prayed for.

The plaintiff, upon the facts appearing, is not entitled to such relief, and the bill of complaint is dismissed.

W. J. YARWOOD v. H. P. JOHNSON ET AL.

(29 Washington 643; 70 Pac. 123. Supreme Court. Sept. 13, 1902.)

Complaint with double aspect. Complaint alleged that one of defendants, a co-tenant with plaintiff had relocated the claim in the name of said defendant's brother although the annual labor for the year had been done. That if not done it was by the collusion of said defendant who had agreed himself to do the work *Held*, that, on either alternative it stated a cause of action.

[1]**Relief whether work done or not done.** It was not error to refuse to compel plaintiff to elect whether he would stand on the allegation that the required amount of work was done, or that, if not, it was through the fraud, etc., of defendant, since more than one state of facts might establish the wrong complained of.

The different measurements of a tunnel before and after the annual period show the amount of feet driven, and the value per foot being known the calculation of the labor is mere matter of figures.

Presumption that owners did the work. It is immaterial that all the co-owners did not do their share of the annual work. And if $100 worth was done on the claim, in the absence of proof to the contrary, it will be presumed to have been done by the owners or some of them.

Estoppel to deny discovery. A complaint alleged that plaintiff and others were the owners of a mining claim by discovery, location, etc., and that the same had been wrongfully relocated by P., acting for W. P., in his answer, did not deny the original discovery by plaintiff; and W., in his notice of relocation, although he had never been upon the claim, set out the discovery. *Held*, that W. could not be heard to deny the original discovery.

Use of brother's name mere subterfuge. Where it appeared that one of the co-tenants of a mining claim shortly after the discovery of valuable rock in the neighborhood gave his brother, who had never been on the claim, a description thereof, and the brother wrote out a notice of location and signed it, whereupon the co-owner relocated the claim in the name of the brother, a finding that the entry and location in the name of the brother was a mere subterfuge to defraud the co-tenants was warranted.

[2]**Where one of several co-tenants of a mining claim attempts** to relocate the same, his act inures to the benefit of his co-tenants.

Mere lapse of time does not dissolve the relationship of co-tenancy.

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[1]*Royston* v. *Miller*, 18 M. R. 418. *Turner* v. *Sawyer*, 17 M. R. 683.
[2]*McCarthy* v. *Speed*, 19 M. R. 615.

Appeal from Superior Court, Spokane County; GEO. W. BELT, Judge.

Suit by W. J. Yarwood against H. P. Johnson and others. From a judgment for plaintiff, defendants appeal. Affirmed.

MERRITT & MERRITT, FRANK D. ALLEN, and ALBERT ALLEN, for appellants.

HAPPY & HINDMAN, for respondent.

WHITE, J. The complaint in this action, in substance, alleges a discovery of a vein, lead, ledge, or lode of quartz and other rock in place, bearing gold, silver, lead, copper, and other valuable mineral deposit, on government land, and the location of the Tenderfoot claim thereon on March 13, 1896, by Geo. A. McDonald and Peter Simons, and that on March 2, 1897, Simons conveyed a one-sixth interest to one James Davis, and thereafter, in 1897, Davis conveyed said one-sixth interest to plaintiff; that by mesne conveyances through the original locators and J. P. O'Farrell, one of the appellants, H. P. Johnson, became the owner of a one-sixth interest therein January 29, 1898; that, although this one-sixth interest was conveyed to appellant H. P. Johnson, one-half of said one-sixth interest was conveyed to him in trust for the appellant William Johnson, and that ever since said deed of January 29, 1898, the appellants, and each of them, owned therein as tenants in common, each owning an undivided one-twelfth; that during the years 1896 and 1897 $100 worth of work was done each year upon the claim; that for more than four years last past, and also during all the times respondent and appellants were tenants in common in said property, the appellant H. P. Johnson acted as the agent for respondent, for hire, in the management of said property, and in performing respondent's *pro rata* part of the assessment

work required by law to be performed thereon, and that in the year 1898, in pursuance of said general agency, appellant H. P. Johnson, at respondent's special instance and request, undertook, promised, and agreed to perform plaintiff's *pro rata* share of the assessment work thereon, for which respondent paid him $20; that respondent has been informed and verily believes that over $100 worth of assessment work was performed upon said claim during the year 1898 by the owners thereof, but that, if it was not so performed, respondent alleges that it was through the fault, fraud, and negligence of the appellants Johnson, and each of them; that by the conduct of appellant H. P. Johnson in assuming, undertaking, and agreeing to act as agent or trustee for respondent with respect to respondent's undivided interest in the property, and relying thereon, respondent was prevented from protecting his said interest and the interest of his other co-tenants in the property by his own personal attention and work, and the respondent alleges that the appellants, and each of them, are estopped from asserting any interest in the property adverse to respondent; that while appellants and respondents were still co-tenants, and while H. P. Johnson was still agent for respondent, on January 1, 1899, H. P. Johnson entered upon the property, posted a notice, and staked the ground,—in other words, relocated or attempted to relocate the ground, in the name of William Johnson, under the name of the Log Cabin claim, and recorded it, etc.,—and that appellant William Johnson had full knowledge of all the facts, and that, although said attempted relocation was made in the name of William Johnson, it was in fact made in William Johnson's name as trustee for the use and benefit of respondent and appellants, and each of them, as their interests may appear, and that whatever interest William Johnson acquired under the relocation inures to the benefit of respondent and appellants; that appellants, and each of them, recognized respondent's interest therein, and agreed that respondent owned a one-

sixth interest therein; that appellant William Johnson agreed that, whatever interest he acquired in said property by said relocation or attempted relocation, he held it in trust for the respondent to the extent of a one-sixth interest; that in the month of January, 1899, and at divers times too numerous to mention, both appellants agreed to convey to respondent his one-sixth interest upon payment of his proportionate share of the expenses in operating and improving said mine and in performing the annual assessment work thereon, which proposition respondent accepted; that prior to commencement of this action respondent demanded an accounting of appellants as to the amount of work and labor performed upon said property, and the amount of money expended thereon, and tendered and offered to pay appellants his proportionate share thereof, and demanded that appellants, and each of them, convey to him his one-sixth interest therein, which they refused to do, etc.; that appellants, and each of them, have ousted respondent from possession, and refused to permit him to enter into the joint possession thereof with them, and refuse to allow him to mine or extract ores therefrom; that appellant William Johnson and wife have conveyed a one-sixth interest to appellant J. P. O'Farrell; that appellants have extracted and sold large bodies of ore, of the value, as respondent believes, of $5,000, and that they are still working the same; that the only value of the property consists in the ores; and that there is no adequate or speedy remedy at law for the waste complained of. The complaint further alleges that appellants are extracting ores from the mine, and that the value of the mine is being destroyed, and that there is no adequate remedy at law for the waste, etc. The prayer of the complaint is for an accounting for money expended on the claim, and the amount of ores extracted therefrom, and the expense of so extracting and marketing the same, and that respondent have judgment for one-sixth of the value of all ores extracted, after deducting the expense of marketing the

same; that appellants Johnson, and each of them, be decreed to hold a one-sixth interest therein for the use and benefit of, and in trust for, respondent, and that, if the net proceeds of ore extracted by appellants be not sufficient to pay respondent's pro rata share of operating and improving the mine, then that the court decree the amount respondent shall pay appellants, and that appellants be compelled to convey to respondent a one-sixth interest in the property, and that appellants be enjoined from working the mine; and for such other and further relief as may seem meet and equitable.

To this complaint each of the appellants demurred on the ground that it did not state facts sufficient to constitute a cause of action. The court overruled the demurrers, and its action in this respect is assigned as error. The appellants contend that the specific cause of action relied upon is uncertain, and cites us to *Kewaunee Co. Sup'rs* v. *Decker,* 30 Wis. 624, where it is said:

"It thus appears that the authorities relied upon do not sanction the position that a complaint in the first instance, and where challenged by demurrer, may be uncertain and ambulatory, purposely so made, now presenting one face to the court, and now another, at the mere will of the pleader, so that it may be regarded as one in tort, or one on contract, or in equity, as he is pleased to name it and the necessities of argument require, and, if discovered to be good in any of the turns of phases which it may thus be made to assume, that it must be upheld in that aspect, as a proper and sufficient pleading by the court. * * * These distinctions continuing, they must be regarded by the courts now as formerly; and now no more than then, except under the peculiar circumstances above noted, can any one complaint or count be made to subserve the purposes of two or more distinct and dissimilar causes of action at the option of the party presenting it. It cannot be 'fish, flesh, or fowl,' according to the appetite of the attorney preparing the dish set before the court. If counsel disagree as to the nature of the action or purpose of the pleading, it is the province of the court to settle the dispute. It is a question, when properly raised, which cannot be left in doubt, and the court must determine with precision and certainty, upon inspection of the pleading, to what class of actions it belongs or was intended,— whether of tort, upon contract, or in equity. * * *"

The cause of action is the wrong complained of,—in this case, the withholding from the respondent of the one-sixth interest in the mining claim mentioned in the pleadings, and, in connection with such withholding, the removal of ore from the mine. More than one state of facts may justify the relief demanded. The prayer of the complaint was for an accounting, for injunctive relief, and that the respondent might be decreed to be the owner of a one-sixth interest in the mine. Under the facts set out in the complaint, the relief prayed for might have been granted, and the court might have decreed (which it, in effect, did) that the relocation of the mine was a cloud upon the respondent's title. The complaint alleges that the assessment work for 1898 was done. If such was the case, appellants' attempted location was absolutely void, and to that extent the complaint states facts sufficient to constitute a cause of action. Even if this were not the case, the complaint, among other things sets up that respondent and appellants were co-tenants, and while such relation existed a relocation of this claim was made; and it is asked that appellants be declared to hold said property in trust for the use and benefit of this respondent. Such allegation, again, constitutes a good cause of action. The prayer was one for general relief, and under such prayer the court can give such relief as the pleadings and evidence warrant. *Dormitzer* v. *Society,* 23 Wash. 132, 62 Pac. 862. In the case of *Damon* v. *Leque,* 14 Wash. 253, 44 Pac. 261, we said:

> "If a plaintiff sets forth facts constituting a cause of action, and entitling him to some relief, he is not to be turned out of court because he has misconceived the nature of his remedial right."

See, also, *Chambers* v. *Hoover,* 3 Wash. T. 107, 13 Pac. 466; *Smith* v. *Wingard,* 3 Wash. T. 291, 13 Pac. 717; *Titlow* v. *Oat Meal Co.* 15 Wash. 652, 47 Pac. 19. In the case of *Meeker* v. *Gilbert,* 3 Wash. T. 369, 381, 19 Pac. 18, 22, it is said:

"The form or manner of the allegations has no significance in that regard. The prayer of the plaintiff or defendant is without weight. The manner in which the parties may have thought best to treat it in their pleadings is unimportant. The question is as to the facts alleged."

See, also, *Watson* v. *Glover*, 21 Wash. 677, 59 Pac. 516.

It is further claimed that the court erred in not requiring the respondent to elect upon which of the allegations in paragraph 9 of the amended complaint he would stand; the first allegation being that "over $100 worth of work was done in 1898, and the second allegation being that, if the same was not so performed, it was through the fault, fraud, etc., of the defendants." The court did not err in refusing to compel the respondent to elect. Under either state of facts alleged, the respondent was entitled to the relief he demanded. As we have said, the cause of action was the wrong complained of, and more than one state of facts might establish the wrong, and justify the relief demanded. Under the code system of pleadings, we see no reason why all the facts justifying the relief may not be stated, and, if necessary, in the disjunctive, as in this case. In so stating facts, two causes of action are not united in one suit. The action remains but one cause of action. The facts stated in the complaint clearly entitle the respondent to equitable relief, and the court properly overruled the demurrers and denied the motion requiring the respondent to elect.

H. P. Johnson and William Johnson answered. The answer of William Johnson denied that McDonald and Simons discovered a vein, lead, ledge, or lode of quartz and other rock in place, bearing gold, silver, lead, and copper, etc., and denied that the assessment work was performed on said mine during the year 1898. For an affirmative defense, his answer alleged that on the 1st day of January, 1899, having theretofore discovered on unappropriated and unoccupied lands of the United States a lode or ledge of mineralized rock, bearing

gold, silver, lead, and other precious metals, he located said claim, etc. The answer of the appellant H. P. Johnson admitted that in January, 1898, he became the owner of an undivided one-sixth interest in the Tenderfoot lode mining claim, and was thereafter recognized and considered as a tenant in common in and to said property; admitted that McDonald and Simons discovered a vein, lead, ledge, or lode of quartz or other rock in place, bearing gold and silver, etc., but denied that the assessment work was done upon said property in the year 1898. The answers of the Johnsons contained other denials and statements, but we do not deem it necessary to set them forth. We think the evidence in this case establishes the following facts: That on or about the 23d day of March, 1896, George McDonald and Peter Simons discovered a vein, ledge, or lode of quartz and other rock in place, bearing gold, silver, and other valuable mineral deposits, on the lands in question; being then unappropriated government lands. On the same day they properly staked said ground, and posted the required notice thereon, and located the same under the name of the Tenderfoot, and thereafter, on the 9th day of April, 1896, caused said notice to be filed for record in the office of the county auditor of Stevens county, where the land was situated; and thereafter, in the year 1897, work was commenced on this claim, and a tunnel was run from 35 to 50 feet. In the year 1898 the property was owned in common by respondent herein, who held a one-sixth interest, and by H. P. Johnson, commonly called and known in the record as "Pete Johnson," who held a one-sixth interest; and the remaining interests in said claim were owned by J. P. O'Farrell, Peter Simons, George McDonald, and Fred Fitzgerald. In the years 1897 and 1898 Pete Johnson was working for respondent, and in the year 1897 did the respondent's assessment work on said claim. In the year 1898 Pete Johnson acquired his one-sixth interest in said claim, and in the year 1898 he agreed to, and did, per-

form what he claimed was the assessment work for himself and the respondent. In the year 1898 over $100 worth of assessment work was done on this claim. During the month of december, 1898, and for several months prior thereto, Pete Johnson was living with his brother William Johnson at the Cleveland camp, about 14 miles from the claim in litigation. He had heard about December 1, 1898, from Fred Fitzgerald (one of the owners of said claim), as he asserts (though it was denied by Fitzgerald), that the assessment work on the claim had not been done, and he so informed his brother William at that time. William testified: "I told him the last day of December, 1898, if the work had not been done, to locate it for me." Pete Johnson had not been on the claim after March, 1898, until he went upon it to relocate it, as he says, at the request of William Johnson. William Johnson and the respondent were and still are owners in other mining property situated in that district, and William knew a long time prior to January 1, 1899, the relation that existed between Pete and Yarwood; knew that Pete was a tenant in common with Yarwood and the others parties in the Tenderfoot; and knew that Pete was on this claim in 1898, doing the assessment work for himself and respondent Yarwood. In 1898 the owners of the Silver Queen, an adjoining or near-by claim, had struck a rich vein or body of ore, and had been shipping considerable ore therefrom. Both of the Johnsons knew this in 1898, and thought that the vein on the Silver Queen passed through the property in question. William testified: "From the description Pete gave me of it, I thought there was a good chance of it running through there. Question. Pete told you the Silver Queen was a pretty good property? Didn't he think it was a pretty good property? Answer. I guess it was. They were shipping ore from it. Question. You say Pete said he thought the ledge ran from the Silver Queen through this ground? Answer. Yes, sir." William Johnson had never been on the Tenderfoot prior to

January 1, 1899, and was never on the Tenderfoot until in May or June of 1899. On December 31, 1898, he wrote out a notice of the location, and signed it, giving to the claim the name of "Log Cabin." His brother Pete described this property to him in order to enable him to make out this notice of location. Pete testified: "I told him about where the Tenderfoot was situated, and said, 'Well, you know where it is situate; then you can stake it that way.' Question. You gave him the description? Answer. I gave him the description." After William wrote out the notice of location, he gave it to Pete, with directions to go and locate the claim, and to be careful that no one else got in ahead of him; and William stated that Pete stated to him that he located the same shortly after midnight of January 1, 1899. Pete says that he located it on January 1, 1899, after breakfast. Pete left the same day that his brother drew up the notice, to go to the mine and post it upon the claim. On January 1, 1899, after posting up this notice on this property and restaking the claim, he went back to the home of his brother William, and continued to reside with him for some time thereafter. Pete did not go back upon the claim until some time in March or April, 1899, at which time he claims that his brother agreed to give him a half interest in the claim if he would go and develop it. Accordingly he went back and commenced to work there, and worked there from that time on. He extended a new tunnel on the claim several hundred feet. Immediately after the respondent found out that Pete had attempted to relocate this claim in his brother William's name, he went to see William Johnson, and, in a conversation, respondent asked him about the jumping of this claim. William told him that it would not hurt him; that he calculated to give him his interest; that he intended to give him and Jack O'Farrell their interest in the property. William Johnson denies that he agreed to give an interest to the respondent, but states that he agreed to sell him an interest. The evidence,

however, shows that at all times the respondent was claiming and still claims an interest in the Tenderfoot. One of the main questions in dispute is as to whether $100 worth of assessment work was done on this claim in 1898. The testimony of the respondent clearly establishes that more than $100 worth of work was done on the claim in 1898. But altogether ignoring the testimony offered on behalf of respondent, we think the testimony of the appellant shows that at least $100 worth of work was done on this claim in 1898, and that it was not subject to relocation because of failure to do assessment work thereon. L. E. Van Horn, a witness for appellants, says that in 1897 the old tunnel was in 35, maybe 40, feet. W. H. Allen, another witness for appellants, testified that in the fall of 1897 it was in 40 or 50 feet. The Monday before Allen testified in this case, he measured the old tunnel, and found that it was in 89 feet. He further testified that but 12 or 14 feet of new work was done on this old tunnel after December 31, 1898, so that on that date this tunnel was in from 75 to 77 feet. The testimony of the appellants show that it was worth $4 a foot to extend this tunnel, some of the testimony putting it as high as $5 a foot. A simple computation on this basis will show that at least $100 worth of work was done on the tunnel in 1898, in extending it the distance it was extended between 1897 and the time it was measured by Allen, deducting the 12 or 14 feet of extension done in 1899. It follows that the rest must have been done in 1898. It is true that the evidence is not clear that all the co-owners did their share of assessment work in 1898, but that makes no difference. One hundred dollars' worth of work was done upon the claim, and, in the absence of proof to the contrary, the presumption is that it was done by the co-owners, or some of them.

It is also claimed that there was no discovery of mineral by the first locators. The testimony of Yarwood and Fitzgerald is positive as to this discovery. Pete Johnson, in his answer,

does not deny the discovery; and William Johnson, in his notice of relocation, although he had never been upon the claim, set out the discovery, and sought to appropriate the land because he then discovered upon it valuable mineral. He was acting through Pete Johnson, as he claims. We do not think, under such circumstances, he should now be allowed to say in the face of his notice of location and Pete's admissions in his answer, that a discovery had not been made upon this claim by the original locators prior to the location of the Log Cabin. If Pete was his agent, Pete's knowledge of that fact was his knowledge. The court found as follows:

"1. I find that H. P. Johnson and Peter Johnson, herein, are one and the same party, and I find that H. P. Johnson and William Johnson, defendants herein are brothers.

"2. I find that on the 23rd day of March, 1896, and a long time prior thereto, George A. McDonald and Peter Simons were both over the age of twenty-one years, and citizens of the United States, and residents of Stevens county, state of Washington.

"3. I find that on the said 23d day of March, 1896, the said George A. McDonald and Peter Simons, and each of them, discovered a vein, lode, lead, or ledge of quartz and rock in place, bearing gold, silver, lead, copper, and other valuable mineral deposits, on certain government land, situate and being in what is known as the 'Cedar Cañon Mining Camp' or 'District,' in the county of Stevens, state of Washington, and more particularly described as follows, to wit: Commencing at a post marked 'No. 1,' at the northeast corner; from thence 300 feet in a westerly direction to a center end post marked 'No. 2'; thence 300 feet, in a westerly direction, to a corner post marked 'No. 3'; thence 1,500 feet, in a southerly direction, to a corner post marked 'No. 4'; thence 300 feet, in an easterly direction, to a center end post marked 'No. 5'; thence 300 feet, in an easterly direction, to a corner post marked 'No. 6'; thence 1,500 feet to the place of beginning. It is bounded on the north end by the Silver Queen mining claim, situated about one mile from the Deer Trail mine, and about two and one-half miles south from Cedarville.

"4. I find that on the 23d day of March, 1896, under and in conformity with the laws of the United States and of the state of Washington relating to the location of quartz mining claims, said George A. McDonald and Peter Simons located the above mentioned and described mining claim, and designated the same by the name of the 'Tenderfoot,' and duly marked the boundaries thereof in

conformity with the laws of the United States and of the state of Washington, and in all other respects complied with the laws in order to complete said location, designated the corners of said claim, and the east and west ends thereof, by plainly marked and substantial stakes, placed in the ground in a substantial and firm manner, so that the boundaries of said claim could be easily and readily traced, and upon each and all of said stakes engraved and marked thereon the designation, object, and purpose of said stakes and monuments, together with the name of the locators, the date of location, and at the same time, within the boundaries of said claim, and at the point of discovery, posted a notice of location, containing a description of said claim, and thereafter recorded the same in Stevens county on the 9th day of April, 1896, in Book N of Quartz Claims of the records of Stevens county, state of Washington.

"5. I further find that on the 2d day of March, 1897, the said Peter Simons, hereinabove mentioned, by a mining deed of that date duly and regularly conveyed an undivided one-sixth interest in and to the property hereinabove described to one James Davis, and that thereafter, on June 28th, in the year 1897, said James Davis, by mining deed, duly and regularly conveyed to the plaintiff herein, W. J. Yarwood, said one-sixth interest to the property herein last above described, and that he, the said W. J. Yarwood, is still the owner of the same.

"6. I find that thereafter, to wit, on the 29th day of January, 1898, by mesne conveyances through the original locators and one J. P. O'Farrell, the defendant herein, Peter Johnson, became the owner of an undivided one-sixth interest in and to the property hereinabove described, known as the 'Tenderfoot Mining Claim,' and was thereafter recognized and considered as a tenant in common with the plaintiff herein and others in and to said property, and that he has never parted with his said interest.

"7. I find that in the years 1896, 1897, and 1898, one hundred dollars' worth of assessment work was done for each and every of said years upon the property hereinabove described, and that all the conditions required by the government to hold said claim above described were duly and regularly performed by the owners thereof.

"8. I find that in the year 1898 the defendant herein, H. P. Johnson, at plaintiff's special instance and request, undertook, promised, and agreed to perform plaintiff's pro rata share of the assessment work on said property, and that he did so perform the same thereon, for which services so performed plaintiff paid said defendant the sum of $8.75 for his compensation therefor.

"9. I find that during the whole of the year 1898, and in the month of January, 1899, George A. McDonald and Peter Simons,

the original locators of the property hereinabove described, J. P. O'Farrell, Peter Johnson, W. J. Yarwood, plaintiff herein, and Fred Fitzgerald, were the owners of the premises above described as co-tenants thereof.

"10. I find that while said parties hereinabove mentioned were still co-tenants in said property, and co-owners thereof, that the said defendants herein, H. P. Johnson and William Johnson, entered into a conspiracy to cheat and defraud the plaintiff herein and the above-named co-owners of said property out of their interest in and to said property, and that, after entering into said conspiracy to so cheat and defraud the said plaintiff herein and the other co-owners out of said property, the said H. P. Johnson, in carrying out of the general conspiracy to cheat and defraud his co-tenants out of their interest in and to said property, thereafter, to wit, on the 1st day of January, 1899, and while in possession of said premises as such co-tenants, attempted to make a relocation of the ground embraced in said Tenderfoot claim, in the name of his said brother, William Johnson, one of the defendants hereinabove mentioned, by then and there erecting stakes and monuments and posting notice of the same under and by the name of the 'Log Cabin Claim,' and that thereafter, to wit, on the 4th day of January, 1899, he caused said notice or attempted notice of relocation to be recorded in Book 7 of Quartz Claims, at page 194, of the records of Stevens county, state of Washington; that the property so attempted to be relocated is the same property set out and mentioned in plaintiff's complaint, and hereinabove specifically described.

"11. I find that thereafter, to wit, on the 30th day of August, 1900, in further carrying out the said unlawful conspiracy to cheat and defraud the plaintiff herein and the other co-tenants in and to said property out of their interest in and to the same, defendant herein, H. P. Johnson, attempted to make an amended relocation of the attempted relocation of January 1, 1899, in the name of his brother, William Johnson, one of the defendants hereinabove mentioned, and that thereafter, to wit, on the 7th day of September, 1900, he caused said attempted amended notice of relocation to be recorded in Book 12 of Quartz Claims, at page 141, of the records of Stevens county, state of Washington.

"12. I find that at the time of the attempted relocation hereinabove mentioned, and prior thereto, the defendant herein, William Johnson, had full knowledge of all the facts hereinabove mentioned and set out.

"13. I find that during the years 1899, 1900, and 1901, that one hundred dollars' worth of assessment work was done for each of said years upon said property hereinabove described by the defendant herein, H. P. Johnson, for the owners thereof, and that all the condi-

tions required by law to hold said claim have been duly and regularly performed and complied with by the owners of said property.

"14. I find that in the year 1899 that the plaintiff herein offered to do his assessment work upon said property, but the defendants herein, and each of them, refused to permit him to enter in and upon said premises, or to perform any of the assessment work thereon.

"15. I find that during all the times hereinabove mentioned the plaintiff herein had been, and now is, willing to perform his part of the assessment work upon the property hereinabove described, and that he is now, and always has been, ready and willing to pay to the defendant herein, H. P, Johnson, his proportion af said assessment work so performed by the said H. P. Johnson.

"16. I find that the defendants herein, and each of them, have ousted the plaintiff and their other co-owners herein from the possession of said property, and have refused to permit him, or either of them, to enter into the joint possession of said property with them, and have refused to permit them, or either of them, to mine said property, or to extract ores therefrom, or to make any improvements or do any work thereon.

"17. I find that prior to the commencement of this action that plaintiff herein demanded an accounting of defendants, and each of them, as to the amount of work and labor performed upon said property, and the amount of ores extracted therefrom, and the amount of money expended thereon, and tendered and offered to pay said defendants, and each of them, his proportionate share thereof."

We think these findings are fully sustained by the evidence. The entry of Pete Johnson in the name of William Johnson on the claim in controversy was a mere subterfuge. We are satisfied it was an entry in his own interest, and the use of his brother William's name was a device arranged between Pete and William to deprive the other owners of their interest in the claim. When Pete undertook to relocate this claim in the name of his brother, the relation of co-tenancy existed between him, the respondent, and the other co-owners of the property, and, so far as any evidence to the contrary appears, such relationship still continues to exist. Pete Johnson was a co-tenant with this respondent. His possession of this property was the possession of his co-tenants. His entry was their entry. The moment that one co-tenant enters upon property, that constitutes an entry of all. Mere lapse of time does not dissolve this relation. When he entered upon the property on January 1, 1899, he entered for the benefit of all co-tenants who were interested with him in the claim. And William Johnson knew that the relation of co-tenancy in this property existed between Pete, respondent, and other parties.

"All acts done by a co-tenant, and relating to or affecting the common property, are presumed to have been done by him for the common benefit of himself and the others. The relation between him and the other owners is always supposed to be amicable, rather than hostile; and his acts are therefore regarded as being in subordination to the title of all the tenants, for by so regarding them they may be made to promote the interests of all. Therefore, as a general proposition, the entry of one co-tenant inures to the benefit of all. * * * 'The possession or entry of one tenant in common or joint tenant is always presumed to be in maintenance of the right of all, and he shall not be presumed to intend a wrong to his companions, if his acts will admit of any other construction.'" Freem. Co-Ten. (2d Ed.) § 166.

"The entry of one co-tenant, as we have shown, is, in the absence of clear proof to the contrary, construed as conferring seisin upon all. And supported by the same reasons, and prevailing to the same extent, is the rule that the continuing possession of a co-tenant, whether the entry was made by himself alone or in connection with his companions, is the possession of all the co-tenants." *Id.*, § 167.

See, also, *McCarthy* v. *Speed* (S. D.) 77 N. W. 590, 50 L. R. A. 184.

From January 1, 1899, the work on this claim and discoveries therein made by the appellants inure to the benefit of Pete and those who were his co-tenants when he made the pretended relocation and entry thereunder on January 1, 1899. *Cedar Canyon M. Co.* v. *Yarwood* (Wash.) 67 Pac. 749. The attempted location and relocation under the name of the Log Cabin claim were mere nullities. We do not think the Tenderfoot claim became a thing of the past under the attempted relocation. The Log Cabin location was not a valid one. The co-tenancy of Pete Johnson and the respondent and the other owners of the Tenderfoot had not terminated when the attempted relocation and entry thereunder were made.

The judgment of the court is correct, and should be affirmed, and it is so ordered, with costs to the respondent.

REAVIS, C. J., and ANDERS, DUNBAR, FULLERTON, HADLEY, and MOUNT, JJ., concur.

[1]OREGON KING MINING CO. v. T. J. BROWN ET AL.

(119 Federal 48. Circuit Court of Appeals, Ninth Circuit. Oct. 6, 1902.)

Staking center line sufficient marking of boundaries. Rev. Stat. U. S. § 2324, which provide that in marking a mining claim "the location must be distinctly marked on the ground so that its boundaries can be readily traced," does not require the boundary lines to be indicated by physical marks or monuments, nor define what kind of marks shall be made, nor on what part of the ground claimed; but any marking, whether by stakes, mounds, monuments, or written notices, whereby the boundaries can be readily traced, is sufficient.

Substantial copy of notice sufficient. Under St. Or. Oct. 14, 1898, providing for the recording of notices of the discovery and location of mining claims, it is not essential to the validity of a location that the record should be a literal copy of the notice posted on the claim, but it is sufficient if it is a substantial copy.

In error to the Circuit Court of the United States for the District of Oregon.

COTTON, TEAL & MINOR, for plaintiff in error.

DOLPH, MALLORY, SIMON & GEARIN, and ALBERT ABRAHAM, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The Oregon King Mining Company, the plaintiff in error, commenced proceedings in the United

[1]This case, as reported in 110 Fed. 728; 21 M. R. 485, resulted in granting a new trial to the defendant company. The second trial brought a second verdict in favor of the plaintiff. The text case is an appeal from judgment on that second verdict. The appeal resulted in a reversal which provided for a third trial which never took place as the suit was in the meantime compromised as counsel inform us. *M. & DeS.*

States land office at The Dalles, Or., to procure a patent for a certain mining claim, called the "Silver King." At the time of its application the company was in possession of the claim, and is so still. The defendants in error contested the application, and, in support of their adverse claim, commenced, pursuant to the provisions of section 2326 of the Revised Statutes [U. S. Comp. St. 1901, p. 1430], the present action in the court below to determine the conflicting claims to the ground, in which action judgment passed for the plaintiffs therein, the defendants in error here.

The plaintiff in error claims the ground by virtue of a location thereof made on the 24th day of June, 1898, by one G. M. Wilson. The defendants in error claim it under a location made on the 31st day of January, 1899, by T. J. Brown and Columbus Friend. Substantially the same ground is covered by both locations. That made by Wilson he called the "Silver King Mining Claim," and that made by Brown and Friend was called by them the "St. Elmo Mining Claim." The case shows that Brown, in connection with Friend, first undertook to locate the ground in controversy on the 10th day of March, 1897, but it is conceded that he did not make any valid location thereof prior to January 31, 1899, so that, if the location made by Wilson on June 24, 1898, was valid (to whose rights the plaintiff in error succeeded), the plaintiff in error is entitled to the property; it having entered into the possession thereof under Wilson's location, and having since retained such possession and worked and developed the claim, expending in such work and development a large sum of money.

At the time of the making of the location by Wilson there was no statute of the state of Oregon requiring any record to be made of a mining location, nor did any statute of that state then add to the requirements of the Revised Statutes of the United States in the matter of the making of locations of mining claims. But by an act of the legislature of Oregon

approved October 14, 1898, and which took effect January 1, 1899, it was provided that any person who is either a citizen of the United States, or has declared his intention to become such, who discovers a vein or lode of mineral-bearing rock in place upon unappropriated public land of the United States within the state of Oregon, may locate a claim upon such vein or lode so discovered by posting thereon a notice of such discovery and location, which notice shall contain: First, the name of the lode or claim; second, the name or names of the locator or locators; third, the date of the location; fourth, the number of linear feet claimed along the vein or lode each way from the point of discovery, with the width on each side of said vein or lode; fifth, the general course or strike of the vein or lode, as near as may be. The boundaries of the claim are by the act required to be defined so that they may be readily traced, and they are required to be marked within three days after the posting of such notice by six substantial posts, projecting not less than three feet above the surface of the ground, and not less than four inches square or in diameter, or by substantial mounds of stone, or earth and stone, at least two feet in height. By section 2 of the act such locator is required to file for record with the recorder of conveyances, if there be one,—otherwise with the clerk of the county wherein the claim is situated,—a copy of the notice so posted by him upon the lode or claim, within 30 days after the date of such posting, which notice is required to be immediately recorded by the officer. By section 3 of the act the locator is required, within 90 days from the date of posting his notice of discovery, to sink a discovery shaft upon the claim located, to a depth of at least 10 feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary, to show by such work a lode or vein of mineral deposit in place, with a provision to the effect that a cut or crosscut or tunnel which cuts the lode at a depth of 10 feet, or an open cut at least 6 feet deep, 4 feet wide, and 10 feet in

length along the lode from the point where the same may be in any manner discovered, shall be deemed equivalent to such discovery shaft, and with a provision to the effect that such work shall not be deemed a part of the assessment work required by the Revised Statutes of the United States.

It appears from the record that the claim in controversy is located upon a large hill, devoid of timber and of vegetation, except a scanty growth of grass, on which a vein of mineral-bearing rock crops out and is clearly visible for a distance of more than 400 feet. It appears that this ledge was known to persons living in the vicinity thereof prior to the coming into the country of either Brown or Wilson, but apparently was not much thought of. About the 1st of March, 1897, Brown went to the vicinity for the purpose of making a visit to Friend. During the time of that visit the two made a trip to a sheep ranch, on their way to which Brown found float from the ledge, and stopped and began to prospect it. Friend said that it did not amount to anything, but Brown continued to examine the ledge while Friend proceeded to the sheep camp; and during his absence Brown erected a monument on the ground and wrote out a notice of location in behalf of himself and Friend, which he placed in the monument, and took some of the samples of the rock to Friend's house. Shortly after this, and without doing any work upon the claim, Brown left the country, and remained away until about the 1st of September, 1897, when he returned with a man named Allen, whom he sought to interest in the claim; but after putting in some shots in the ledge and making some tests of the rock (which they made at the house of a Mr. Furnall, where they were staying), Allen concluded that it was not rich enough, and declined to take any interest in the claim. Brown and Allen then left. In September, 1897, Wilson, who had been out prospecting, stopped at Furnall's house; and on that occasion Furnall picked up a piece of rock from this ledge and said, "Here is a piece of rock I can

either pan or mortar up and wash gold out of it." Wilson asked where the rock came from, and Furnall pointed to the hill where the ground in controversy is located. When Wilson left for his home he took with him a piece of the rock which Furnall gave him, and during the succeeding winter had it assayed, with the result that it showed a high value in gold. About the 1st of June, 1898, Wilson returned to the neighborhood with John Knight and J. F. Hubbard; first going to the house of Furnall, and afterwards to that of Friend. From there, Wilson, Knight, and Hubbard went up the hill in search of the ledge from which the rock given him by Furnall was taken. They found it, and also the monument and notice erected and posted by Brown in behalf of himself and Friend in the preceding year. Wilson and Hubbard and Knight thereafter from time to time did work upon the ledge, consisting of small cuts, and took ore therefrom, which upon assay showed considerable value in gold and silver, and on the 24th day of June, 1898, put up at the east end of the Silver King claim a mound of rock taken from one of the cuts made by them, in which they placed a notice reading as follows:

"State of Oregon, County of Crook—ss: Know all men by these presents that I, the undersigned, has this 24th day of June, 1898, claimed, by right of discovery and location, 1,500 feet of linear and horizontal measurement in length, and 600 feet in width, a quartz ledge along the vein or lode thereof, 1,500 feet of said claim lying and being in westerly direction from the mound of stone of the discovery monument, with all dips, spurs, variations, and angles; said claim being more particularly described as follows: Situated on Sec. 30, T. 9, R. 17 E., Crook county, Oregon, near the Trout creeks. This claim shall be known as the 'Silver King.' Also I claim all water right to work the same.

"Discoverer:
"G. M. Wilson.

"Witnesses:
"J. F. Hubbard.
"John Knight."

There was evidence given on behalf of the defendant (plaintiff in error) tending to show that Wilson, Hubbard, and Knight then stepped to the west, intending to measure 1,500 feet, and in the west end set in the ground a juniper stake, about 4 inches square, so that it stood up out of the ground about 4 or 4½ feet,—the stake being set about on a line with the ledge; that on the east side of the stake they marked, "Silver King 1,500 feet easterly," and on the south side, "300 feet southerly," and on the north side, "300 feet northerly. Shortly after this the party left the country, and returned about the 1st of August of the same year, and sunk a shaft on the vein about 6 by 4 feet, and to a depth of 9 or 9½ feet. Wilson and Hubbard then left, leaving Knight at the claim for the purpose of shipping some ore therefrom to the smelter at Tacoma, which he did, to the extent of 5 tons, during the month of September, and from which was realized about $125 per ton. A few days after getting this return, Knight went back to his home, at Pendleton, Or. In the early part of February, 1899, he returned to the claim and found Brown in possession; Brown having been informed during January, 1899, by Mrs. Furnall, of the result of the ore shipment by Knight. Brown, contending that Wilson had no right to make a location of the ground in controversy, proceeded on the 31st day of January, 1899, to locate the same ground in behalf of himself and Friend; undertaking to mark and stake the boundaries thereof, and placing in the monument at the east end, alongside of Wilson's monument, a notice in these words and figures:

"Location Notice.

"State of Oregon, County of Crook: Know all men by these presents that we, the undersigned, have this 31st day of January, 1899, do locate this ledge of mineral-bearing quartz, commencing at this monument of stone, running 1,500 linear feet in a westerly direction to a stake. We also claim 300 linear feet on each side of center line along this ledge, with claim all dips, spurs, angles, and varia-

tions, being particularly described as follows: Sec. 30, T. 9, R. 17 E., Crook county, Oregon, ¾ mile east of Trout creek. This claim shall be known as the 'St, Elmo Mining Claim.'

"Witnesses:
"Nettie Friend.
"Anna Brown.

Locators:
T. J. Brown.
C. Friend."

The ground so located by Brown on the 31st day of January, 1899, was substantially the same ground undertaken to be located by Wilson on the 24th day of the previous June; and, according to the testimony of Brown himself, substantially the same ground was undertaken to be embraced by his lines, for the reason that he claimed to have been the first discoverer of the vein, and for the reason that he contended that Wilson's location was invalid.

Trout creek mining district, in which is situated the ground in controversy, was organized in August, 1898; and on the 15th day of that month one James Wood was appointed deputy recorder for such district, under and in pursuance of the provisions of section 3831 of Hill's Annotated Laws of Oregon, which reads as follows:

"It shall be the duty of the county clerk of any county, upon the receipt of notice of a miners' meeting organizing a miners' district in said county, with a description of the boundaries thereof, to record the same in a book to be kept in his office as other county records, to be called a 'book of record of mining claims;' and upon the petition of parties interested, he may appoint a deputy for such district, who shall reside in said district or its vicinity, and shall record all mining claims and water rights in the order in which they are presented for record, and shall transmit a copy of such record at the end of each month to the county clerk, who shall record the same in the above-mentioned book of record, for which he shall receive one dollar for each and every claim. It shall further be the duty of said county clerk to furnish a copy of this law to his said deputy, who shall keep the same in his office, open at all reasonable times for the inspection of all persons interested therein."

This section of the Code was repealed by the Oregon act of October 14, 1898. Nevertheless Wood continued to act as

such deputy recorder of mining claims until June 21, 1899. After the location by Brown and Friend of the ground in controversy as the St. Elmo claim on the 31st day of January, 1899, and the posting thereon of the notice by them last above set out, they gave to Wood a copy thereof for record. Wood had blank forms of his own, into which his practice was to incorporate the substance of mining notices filed with him for record, which he recorded in his record book, and thereafter forwarded the blank so filled to the county clerk for record. He pursued that course with the notice filed with him by Brown and Friend; the notice so recorded in the book of records of the mining district, and forwarded by Wood to the county recorder, reading as follows:

"Notice is hereby given that the undersigned, being a citizen of the United States of America, and over the age of twenty-one years, and having complied with the requirements of chapter six of title thirty-two of the Revised Statutes of the United States, and the local customs, laws, and regulations, has located 1,500 feet linear and horizontal measurement in length, and 600 feet in width, on the lode or vein of mineral-bearing quartz, with all dips and spurs and angles; said lode being situated in the Trout creek mining district of Crook county, Oregon, and more particularly described as follows: Beginning at a monument of stone, and running 1,500 feet in a westerly course to a stake, with 300 feet of ground on each said [side] of said described line, situated ¾ of a mile east of Big Trout creek, in Sec. 30, T. 9, R. 17 East. This claim shall be known as 'The St. Elmo.' Located this 31st day of January, 1899.

"Witnesses: T. J. Brown and C. Friend, Locators.

"Nettie Friend.

"Anna Brown."

Brown remained in possession of the claim from the time of the location made January 31, 1899, until the 1st of April following, during which time he did some work upon it. Friend conveyed his interest therein to Brown on the 21st day of February of the same year, and thereafter Brown conveyed a half of his interest in the claim to the defendant in error Maddox. On the trial there was testimony tending to

show that at the time of Brown's location, on the 31st day of January, 1899, the west end center stake claimed to have been placed by Wilson did not in fact exist. About the 1st of April Brown left the claim which was soon taken possession of by Wilson under his location of June 24, 1898, and has ever since been held by him and those claiming under him.

The fundamental questions contested at the trial in the court below, and presented by the record here, are: First, whether the Wilson location, made June 24, 1898, was properly marked upon the ground; and, second, if it was not, whether a copy of Brown's location of January 31, 1899, was recorded as required by the act of the state of Oregon of October 14, 1898. Other questions, of a minor character, also arose during the trial in the court below, which it will be unnecessary to consider, in the view we take of the case.

The case was tried with a jury. In the answer of the defendant to the plaintiff's complaint, it was, among other things, alleged: That Wilson, having on the 24th day of June, 1898, discovered therein a vein of rock in place, carrying precious metals, located a claim called the "Silver King Mining Claim," embracing the vein; so marking it that its boundaries could be readily traced; the same being "by the erection of a monument of stone at least two feet in diameter at its base, and four feet in height, which said monument was so erected and located at the east end center of said Silver King mining claim, and at the east end of said ledge, lead, lode, or vein of rock in place, and by making a cut into said ledge, lead, lode, or vein, and along the same, which said cut was 8 feet wide, 8 feet long, and 6 feet deep at the upper end thereof; and said Wilson then and there placed in a conspicuous place in said monument, at the east end center of said claim, a notice in words and figures" as hereinbefore set out. "That, at the point where said monument was so erected, said ledge, lead, lode, or vein of rock in place crops out, and forms a ridge upon the surface of the ground, and is plainly

visible, and can be readily traced and followed in a straight line from said point for a distance of over 400 feet therefrom, in a westerly direction; said ground being barren and devoid of timber or vegetation, excepting only a scanty growth of grass. That the said G. M. Wilson at said time further distinctly marked said claim and the location thereof upon the ground, by placing a square stake at the west end center of said claim, and in a line with said ledge, lead, lode, or vein of rock in place, and an extension thereof, which said square stake was firmly set in the ground, and projected at least 3 feet above the ground, and was at least 4 inches in diameter, and was so set in the ground that one of the sides thereof faced towards the said monument of stone at the east end center of said claim, and said face of said stake was plainly marked 'Silver King,' '1,500 feet easterly,' and the north face of said stake was plainly marked '300 feet northerly,' and the south face of said stake was plainly marked '300 feet southerly.' That said G. M. Wilson set said stake in a line with the croppings of said ledge, lead, lode, or vein of rock in place, and upon the extension thereof, and intended to set the same 1,500 feet westerly along said ledge, lead, lode, or vein, and an extension thereof from said monument of stone at the east end center of said claim, but miscalculated the distance thereof, and set said stake 1,368 feet westerly from said east end center monument. That said G. M. Wilson further at said time distinctly marked said claim and the location thereof upon the ground by sinking a shaft upon the line of said croppings of said ledge, lead, lode, or vein of rock in place, and on a direct line between said discovery monument and said west end center stake, which said shaft was sunk to a depth of nine feet, and at a point about 400 feet westerly from the east end center, and also by running a crosscut about 50 feet long, connecting with said shaft."

At the trial the defendant (plaintiff in error here) requested the court to instruct the jury that, if Wilson marked

his claim as alleged in the answer, such marking was a sufficient compliance with section 2324 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1426], and that Wilson's location, so far as marking was concerned, was therefore valid, which instruction the court below refused to give, to which action the defendant excepted. The court below, in more than one instance, against the objection and exception of the defendant, refused to determine the validity or invalidity of the Wilson location as a matter of law, but submitted that question to the jury as one of fact, under instructions as to the law by which they should be guided in determining the question. Concerning the necessary marking of the claim, the court said in its instructions:

"The test is not as to whether the notice would so describe the claim that it could be surveyed. The lines themselves must be indicated by physical marks or monuments, so that one unfamiliar with surveying, and without the aid of measuring instruments or a compass, can readily see by the marks themselves just what is claimed; that is to say, it is my opinion that it is not sufficient that a surveyor might go and find this claim, for the reason that the object of this notice and marking is to advise people who are in that country, and who are not surveyors, and in cases where it is not practicable to have that kind of service, to determine by observation, from what has been done upon the ground, that there has been a location, and its boundaries. The plain provision of the statute which requires a mining location to be so marked upon the ground that its boundaries can be easily traced is salutary and beneficial, and is not to be frittered away by construction. After the discovery, the marking is the main act of location. Without it the location is invalid."

The most of what was there said by the court below was correct and proper. The vice is in that part of the instruction in which the jury was clearly and distinctly told that the lines themselves must be indicated by physical marks and monuments, so that one unfamiliar with surveying, and without the aid of measuring instruments, can readily see just what is claimed. The opinion entertained and given effect

by the court below in its rulings in respect to the necessity of indicating the boundaries of the claim by physical marks or monuments, in order to constitute a valid location, is further shown by its refusal to give the following instructions requested by the defendant, to which exceptions were reserved:

"In regard to the manner of marking, I call your attention to the fact that the law does not require the boundaries of the claim to be marked. It is the location that must be marked, and the law does not say how it shall be marked, excepting that it must be distinctly marked, so that its boundaries can be readily traced; that is, the location must be designated by some means placed upon the ground, so that any one visiting the ground, and endeavoring to do so, can readily trace the boundaries of the location made."

"At the time Wilson attempted to make his location, the law did not prescribe or define what kind of markings he should make, or upon what part or the ground or claim he should place the same. He was not required to place such markings at the corners of the location. Any marking on the ground claimed, by means of stakes, mounds, and written notices, is sufficient, if thereby the boundaries of the location can be readily traced; and in this connection you have a right to take into consideration the character of the ground, and any natural conditions that may aid the markings placed upon the location in determining its boundaries, or which may assist in the tracing of the boundaries from any markings which may have been placed upon the same."

The statute under and by virtue of which such locations are made does not say that the boundaries shall be indicated by physical marks or monuments, nor in any particular or designated manner. The requirement is that the location shall be so distinctly marked on the ground as that its boundaries may be readily traced. Section 2324, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1426]. It has been many times decided that any marking on the ground, whether by stakes, monuments, mounds, or written notices, whereby the boundaries of the location can be readily traced, is sufficient. The latest decision by the supreme court of the United States to that effect is found in the case of *McKinley Creek M. Co.* v. *Alaska United M. Co.* 183 U. S. 563, 46 L. Ed. 331, in which the

notice described each of two locations as "a placer mining claim 1,500 feet, running with the creek, and 300 feet on each side from center of creek known as 'McKinley Creek,' in Porcupine mining district." "These notices," which it appears were written upon a stump or snag in the creek, said Mr. Justice McKenna, delivering the unanimous opinion of the supreme court, "constituted a sufficient location. The creek was identified, and between it and the stump there was a definite relation, which, combined with the measurements, enabled the boundaries of the claim to be readily traced."

In *Gleeson* v. *Mining Co.* 13 Nev. 442, 462, the court, speaking through Beatty, J., said:

"The object of the law in requiring the location to be marked on the ground is to fix the claim, to prevent floating or swinging, so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated, in order to make their locations upon the residue. We concede that the provisions of the law designed for the attainment of this object are most important and beneficent, and that they ought not to be frittered away by construction. But it must be remembered that the law does not, in express terms, require the boundaries to be marked. It requires the location to be so marked that its boundaries can be readily traced. Stakes at the corners do not mark the boundaries. They are only a means by which the boundaries may be traced. Why not, then, allow the same efficacy to the marking of a center line in a district, where the extent of a claim on each side of the center line is established by the local rules? It would be safer, and therefore better, to comply with the recommendations of the land office, and erect stakes at the corners of the claim; but, if the grand object of the claim is attained by the marking of a center line, we can see no reason why it should not be allowed to be sufficient. In this case the locators of the Paymaster marked the center line of their claim on the 10th of October, 1872. No miner, no man of common intelligence acquainted with the customs of the country, could have gone on the ground and seen the monument, notice, and work at the discovery point, and the two stakes, one three hundred feet southeast of the location monument, marked, 'Southeasterly stake of Paymaster,' the other twelve hundred feet northwest of the location monument, and marked, 'Northwesterly stake of Paymaster,' in a line with the croppings and with the discovery point, without seeing at a glance that they marked

the center line of the claim. By the rules of the district and the laws of the land, he would have been informed that the boundaries of the claim were formed by lines parallel to the center line and three hundred feet distant therefrom, and by end lines at right angles thereto. With this knowledge, he could easily have traced the boundaries, and, if such was his wish, ascertained exactly where he could locate with safety."

Judge Sawyer, in instructing the jury in the case of *North Noonday M. Co.* v. *Orient M. Co.* (C. C.) 11 Fed. 125, 6 Sawy. 299, 310, upon the point in question, said:

"To make a valid location under the statute, it is required that 'the location must be distinctly marked on the ground, so that its boundaries can be readily traced;' but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground claimed they shall be placed. Any marking on the ground claimed, by stakes and mounds and written notices, whereby the boundaries of the claim located can be readily traced, is sufficient. If the center line of a location of a lode claim lengthwise along the lode be marked by a prominent stake or monument at each end thereof, upon one or both of which is placed a written notice showing that the locator claims the length of said line upon the lode from stake to stake, and a certain specified number of feet in width upon each side of such line, such location of the claim is so marked that the boundaries may be readily traced, and, so far as the marking of the location is concerned, is a sufficient compliance with the law."

In speaking to the same point, Judge Hawley, in the case of *Book* v. *Justice Co.* (C. C.) 58 Fed. 106, 113, said:

"All the authorities agree that any marking on the ground by stakes, monuments, mounds, and written notices, whereby the boundaries of the location can be easily traced, is sufficient."

See also, *Haws* v. *Mining Co.* 160 U. S. 303, 318, 40 L. Ed. 436; *Southern Cross G. & S. M. Co.* v. *Europa M. Co.* 15 Nev. 383; *Jupiter M. Co.* v. *Bodie Con. M. Co.* (C. C.) 11 Fed. 667; *Hauswirth* v. *Butcher,* 4 Mont. 308, 1 Pac. 714; *Upton* v. *Larkin,* 7 Mont. 449, 17 Pac. 728; *Pollard* v.

Shively, 5 Colo. 309; *Eilers* v. *Boatman,* 3 Utah 159, 2 Pac. 66; *Du Prat* v. *James,* 65 Cal. 555, 4 Pac. 562; *Taylor* v. *Middleton,* 67 Cal. 656, 8 Pac. 594.

The error committed by the court below, above indicated, necessitating the reversal of the judgment and the remanding of the case for a new trial, it becomes necessary to decide but one other of the questions presented by the appeal; and that is whether or not it be necessary that the copy of the notice of location required by the Oregon statute to be recorded be a literal and exact copy of the notice posted. We think it clear that it need only be a substantial copy. *Gird* v. *Oil Co.* (C. C.) 60 Fed. 531; *Myers* v. *Spooner,* 55 Cal. 257; *Doe* v. *Mining Co.* 17 C. C. A. 190, 70 Fed. 457; *Metcalf* v. *Prescott* (Mont.) 25 Pac. 1038; *Preston* v. *Hunter,* 15 C. C. A. 148, 67 Fed. 996; *Carter* v. *Bacigalupi* (Cal.) 23 Pac. 363; *Deeney* v. *Milling Co.* (N. M.) 67 Pac. 724; Lindl. Mines, § 381; Barringer & A. Mines & M., p. 253.

The judgment is reversed, and cause remanded for a new trial.

FEDERAL OIL CO. v. WESTERN OIL CO. ET AL.

(121 Federal 674. Circuit Court of Appeals, Seventh Circuit. October 7, 1902.)

[1]**No specific performance of option contract.** Equity will not decree specific performance of a contract which is unfair or unconscionable, or where performance by the complainant is entirely optional, and no offer of performance is made.

Instance: Lessee cannot delay sinking by paying rent. An oil and gas lease on 80 acres of land provided that, if a well was not commenced at once, the lessee should pay the lessor $8.75 per month during the delay. The lessor was to receive as a royalty one-eighth of the oil produced, and $100 per year for each producing gas well, together with gas for use in his residence. There was no limit as to time, no provision obligating the lessee to make any well, and the contract was terminable at its option. It drilled no well, but made the monthly payments for about eight months, when the lessor refused to accept further payments and leased to another party. *Held*, that the contract contemplated the exploration of the property at once; that the monthly payments were not a part performance, but merely a stipulated sum for delay in performance; and that the contract would not be specifically enforced, because of its want of mutuality.

Appeal from the Circuit Court of the United States for the District of Indiana.

For opinion below, see 112 Fed. 373, 22 M. R. 25.

[1]Lindley, 2nd Ed. § 859; Rogers, 2nd Ed. 379; MacSwinney, 2nd Ed. 210.

Specific performance of contract for mining lease enforced because of uncertainty of compensation at law. *Oakford* v. *Hackley*, 19 M. R. 708. *Hexter* v. *Pearce*, 21 M. R. 143. And that the customary details of the lease were not mentioned in the preliminary contract is no defense. *Cochrane* v. *Justice Co.* 16 Colo. 415; 26 Pac. 780.

Option holder not purchaser for value. *National Oil Co.* v. *Teel*, 22 M. R. 263.

Equity will not decree specific performance where the consideration is not fair and adequate. *Prince* v. *Lamb*, 20 M. R. 419.

The appellant on November 18, 1901, filed its bill in the court below, setting forth that on February 22, 1901, it entered into an agreement with the Bradfords, appellees, as follows:

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, R. W. Bradford of Van Buren, Ind., of the first part, hereby grant and guarantee unto the Federal Oil Company (a corporation) of Chicago, state of Illinois, second party, all the oil and gas in and under the following described premises together with the right to enter thereon at all times for the purpose of drilling and operating for oil and gas and to erect and maintain all buildings and structures and lay all pipes necessary for the production and transportation of oil or gas. The first part shall have the one-eighth (⅛) part of oil produced and saved from said premises to be delivered in the pipe line with which second party may connect their wells namely: All that certain lot of land, described as follows, to wit: South half of the northwest quarter of section ten (10) town twenty-five (25) north range nine (9) east, in county of Grant and state of Indiana, containing eighty (80) acres, more or less.

"To have and to hold the above-described premises on the following conditions:—

"If gas only is found, in sufficient quantities to transport, second party agrees to pay the first party one hundred ($100) dollars annually for the product of each and every well so transported, and the first party to have free of cost for heating and lighting purposes in dwelling house. Second party shall bury all oil and gas lines when same interfere with cultivation, and pay all damage done by reason of operating under this grant.

"In case no well is commenced within one day from this date, then this grant shall become null and void unless second party shall thereafter pay at the rate of eight and seventy-five hundredths dollars ($8.75) for each month such commencement is delayed, in advance. A check to the credit of the first part mailed to Van Buren, Ind., will be good and sufficient payment for any money falling due on this grant. First party has right to locate roads to and from places of operations. No well shall be drilled nearer to buildings than three hundred feet, unless by agreement and with an understanding between the parties hereto. Second party to erect and maintain gates and keep same closed. Shackel lines shall be high enough for train to pass under. Second well shall be completed ninety days after first well and a well each ninety days thereafter until seven wells are in, then rental to cease.

"The second party shall have the right to use sufficient gas, oil and water to run all machinery for operating said wells, also the right to remove all its property at any time, and may cancel and annul this contract or any part thereof at any time.

"It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, successors and assigns."

The bill alleges compliance by the appellant with the stipulations of the instrument; the payment by it of $8.75 per month in advance; that the tender of $8.75 on October 19, 1901, was refused by the Bradfords, who, ignoring the rights of the appellant, placed the Western Oil Company, appellee, in possession, which company, with knowledge of the rights of the appellant, had placed machinery upon the land, had made excavations, and were drilling thereon for oil and gas; that subsequently thereto, and on November 14, 1901, the appellant moved material upon the land for the purpose of erecting a rig thereon to be used in drilling for oil and natural gas, which material was removed by the Western Oil Company, with the knowledge and approval of the Bradfords, and cast upon the highway. The bill alleges that the acts complained of constitute a lien and cloud upon the leasehold title of the appellant, removable only in equity, that it has no adequate remedy at law, and prays an injunction suitably restraining the appellees, and a decree to establish the title of the appellant, and to subordinate all rights of the appellees to the title of the appellant. A demurrer to the bill was sustained by the court below (Federal Oil Company v. Western Oil Company [C. C.] 112 Fed. 373), and on January 11, 1902, a decree passed dismissing the bill for want of equity, which decree is brought here for review.

E. H. ADAMS, for appellant.

FRANK E. GAVIN and D. J. CABLE, for appellees.

Before JENKINS and GROSSCUP, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). The nature of property in natural gas and oil contained in the earth, and the legal effect of the instrument here in question, have been settled authoritatively by the rulings of the supreme court of Indiana (*State* v. *Indiana & Ohio Oil, Gas & M. Co.* 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579; *People's Gas Co.* v. *Tyner,* 131 Ind. 277, 31 N. E. 59, 16 L. R. A. 443, 31 Am. St. Rep. 433; *Heal* v. *Niagara Oil Co.* 150 Ind. 483, 50 N. E. 482; *Manufacturers' Gas Co.* v. *Indi-*

ana Gas Co. 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768), and by the supreme court of the United States in *Ohio Coal Co.* v. *Indiana,* 177 U. S. 190. In the last case the nature of the property right is thus clearly stated by Mr. Justice White (page 208, 177 U. S., page 583, 20 Sup. Ct., and 44 L. Ed. 729):

"It is apparent that the cases in question [referring to the Indiana cases cited], in accord with the rule of general law, settle the rule of property in the state of Indiana to be as follows: Although in virtue of his proprietorship, the owner of the surface may bore wells for the purpose of extracting natural gas and oil, until these substances are actually reduced by him to possession he has no title whatever to them as owner; that is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession. It is also clear from the Indiana cases cited that, in the absence of regulation by law, every owner of the surface within a gas field may prosecute his efforts, and may reduce to possession all or every part, if possible, of the deposits, without violating the rights of the other surface owners."

The legal effect of the instrument here in question is therefore the grant of a mere use for the purpose of prospecting. The title is inchoate, and for purposes of exploration only until oil or gas is found.

If not found, no estate vests in the lessee, and his title, whatever it is, ends with the abandonment of the unsuccessful search. If found, the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract. *Heal* v. *Niagara Oil Co.* 150 Ind. 483, 50 N. E. 482; *Venture Oil Co.* v. *Fretts* 152 Pa. 451, 25 Atl. 732.

The question then arises whether the specific performance of this contract should be enforced in equity. The principles by which courts of equity are guided in respect to the subject are well established. The right to specific performance is not absolute, but rests in judicial discretion—not an arbi-

trary, capricious discretion, but sound judicial discretion, controlled by established principles of equity, and exercised upon the consideration of all the circumstances of each particular case. The contract must possess certain elements, to demand of equity the exercise of its jurisdiction to enforce performance. It must be upon a valuable consideration. It must be mutual in its obligations and in its remedy. It must be perfectly fair, equal, and just in its terms and in its circumstances, and the situation must be such that the remedy of specific performance will not be harsh or oppressive. The contract must be such that the court is able to make an efficient decree for its specific performance, and to enforce the decree when made. Pomeroy's Eq. § 1405.

With respect to the agreement in question, there are two considerations which go far to impeach its fairness:

First, its want of mutuality. No obligation is assumed by the appellant to do anything—either to drill or to pay. It is in fact a mere option. It is undoubtedly true, as urged by the appellant, with respect to enterprises of this character, that a company proposing to obtain natural gas or oil in large quantities for sale or manufacturing purposes, finds it desirable to acquire exclusive right to search for the fugitive mineral in a large area or areas; and, though it be not necessary for the proper development of the particular area to drill a well upon the land of all the several proprietors within the district, it is desirable and profitable to have no competing wells on the territory near to the wells deemed sufficient for the development of the territory. That, however, was not the purpose of this contract. It contemplated immediate exploration upon the particular land. A well was to be commenced within one day from its date, and postponement of operation was to be compensated for at the rate of $8.75 for each month that such commencement was delayed. Bradford was to have one-eighth part of the oil produced, and, if gas only should be found, $100 annually for the product of each well, and to

have gas free of cost for heating and lighting purposes in his dwelling. It was not contemplated, as we read this instrument, that the appellant could indefinitely postpone the commencement of operations upon the payment of $8.75 per month. That would only compensate during the delay for the gas which Bradford would receive if gas only should be found, and he would receive no compensation for oil if oil should be found by drilling upon other land within the oil district. The appellant had the right at any time to remove its property and cease operations without respect to the interests of Bradford, and with respect only to its own interest; and it could cancel and annul the contract, or any part thereof, at any time. There was here an entire want of mutuality—an utter absence of obligation on the part of the appellant. Equity will not specifically enforce a contract against one party when it cannot be specifically enforced against the other. *Marble Co.* v. *Ripley,* 10 Wall. 339, 359, 19 L. Ed. 955; *Karrick* v. *Hannaman,* 168 U. S. 328, 336, 18 Sup. Ct. 135, 42 L. Ed. 484. Not only could this contract be not enforced against the appellant, for want of obligation assumed, but it does not offer by its bill to do that which it was the obvious intent of the contract it should do, but which it had not obligated itself to do, namely, to drill for oil and gas. Tender of performance is absolutely necessary, especially in cases of optional contracts. *Kelsey* v. *Crowther,* 162 U. S. 404, 16 Sup. Ct. 808, 40 L. Ed. 1017; *Richards* v. *Green,* 23 N. J. Eq. 536. The only effect of a decree would be to drive the appellees out of possession and put the appellant in possession; allowing it to hold the land indefinitely without action upon its part, and to exploit adjacent lands for natural gas and oil, if it had acquired the right so to do, and thus to defeat any participation by Bradford in the oil which may be beneath the surface of his land. It is no answer to say that the appellant could only do this upon monthly payments to Bradford of $8.75, for that would not compen-

sate him for his share of the oil which it was hoped would be developed, and would permit the appellant, if it had obtained like rights upon adjoining lands, and should, by drilling thereon, develop the presence of oil, to obtain the oil beneath the surface of Bradford's land without any participation therein by him. Nor does the fact that the monthly payments had been made for some months after the contract remove from this agreement the want of mutuality. That payment was not part performance of the contract, but merely the stipulated sum for delay in performance. Contracts unperformed, optional as to one party, are optional as to both. The contract here was determined by the act of Bradford refusing to receive the stipulated sum for further delay, and by placing the Western Oil Company in possession. *Knight* v. *Indiana Coal & Iron Co.* 47 Ind. 105, 17 Am. Rep. 692; *Huggins* v. *Daley,* 40 C. C. A. 12, 99 Fed. 606, 48 L. R. A. 320; *Reese* v. *Zinn* (C. C.) 103 Fed. 97.

Secondly, this agreement, upon its face, is without limit of time. There is no period within which the thing sought to be accomplished must be commenced, or the contract should cease. It is terminable at the will of the appellant. Certainly the contract is most unfair, and it would be unconscionable for a court of equity to place the appellant in a position to forever deprive the owner of the soil of the right to use his land, or to drill for such treasures as the earth may contain. *Munroe* v. *Armstrong,* 96 Pa. 307.

The decree is affirmed.

THE PENNSYLVANIA MINING CO. OF COLORADO v. JACOB W. BALES.

(18 Colorado Appeals 108; 70 Pac. 444. Court of Appeals. October 13, 1902.)

[1]**The failure to adverse within the sixty days or to bring suit within the thirty days must be specially pleaded below; otherwise these defenses are waived.**

The file mark on the complaint shows the date when suit is brought without the aid of an averment as to the time in the body of the complaint.

Error to District Court, Clear Creek County.

Action by Jacob W. Bales against the Pennsylvania Mining Company of Colorado. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

W. J. THOMAS and C. H. PIERCE, for plaintiff in error.

J. J. WHITE and Messrs. MORRISON & DE SOTO, for defendant in error.

GUNTER, J. This was an adverse suit. Plaintiff had verdict and judgment.

Defendant—plaintiff in error—contends that the complaint did not state a cause of action in this: It omitted to allege the filing of the adverse in the land office within the sixty days of publication, and failed to allege that this action was instituted within thirty days from the filing of the adverse. These objections were made first at the trial in resistance to the introduction of the evidence.

1. The complaint alleged the filing of the adverse in the

[1]*Altoona Co.* v. *Integral Co.* 18 M. R. 410. *Rawlings* v. *Casey*, 19 Colo. App. 152; 73 Pac. 1090.

land office. The federal statute prescribes that the adverse shall be filed within the sixty days of publication. The allegation that the land office had received and filed the adverse carried with it a presumption that it had been filed within the legal time—sixty days. If defendant desired to raise the question of failure to file within the sixty days he should have done so by pleading it specially in a demurrer or answer; having gone to trial without having done so, it was waived. *Richmond M. Co.* v. *Rose,* 104 U. S. 576, 583; *Marshall M. Co.* v. *Kirtley,* 12 Colo. 417, 21 Pac. 492; *Providence M. Co.* v. *Marks,* 60 Pac. (Ariz.) 939.

2. The above authorities sustain the conclusion that defendant in the same manner waived the objection—if one—that the complaint herein did not allege the filing thereof within thirty days from the filing of the adverse in the land office.

Further, it sufficiently appears from the complaint herein that the adverse claim was filed September 17, and the file mark in the record proper discloses that the complaint herein was filed October 3, within the thirty days required. As the court below took judicial notice of the file mark it was not necessary to allege its date in the complaint. The file mark is before this court in the record proper. *Swem* v. *Green,* 9 Colo. 358, 12 Pac. 202.

The fact of the filing of the complaint within the thirty days was thus before the court without an allegation to such effect therein.

Judgment affirmed.

Affirmed.

NEILSON v. CHAMPAGNE MINING & MILLING CO. ET AL.

[1](119 Fed. 123. Circuit Court of Appeals, Eighth Circuit. Nov. 10, 1902.)

A protestant is not a party asserting his own rights, but an *amicus curiae*, suggesting irregularities. The right to protest is not the right to contest title.

[2]**The patent when issued relates back** to the inception of the right of the patentee.

[3]**A protestant unsuccessful in the land office,** has no equity to pursue his assertions of error in the courts on the pretense that the government has passed its title through errors of law.

No location after entry. One whose assertion of title had its inception after defendant's entry in the land office cannot attack the patent nor allege a trust in the patentee.

Appeal from the Circuit Court of the United States for the District of Colorado.

NORMAN T. MASON and DARWIN T. MASON, for appellant.

A. T. GUNNELL, W. T. MILLER, and W. J. CHINN, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

[1]S. C. below on demurrer, 21 M. R. 664.

[2]*Murray* v. *Tingley*, 19 M. R. 137.

[3]While a contest is pending in the land office the court has no jurisdiction to pass on the title. *Cosmos Co.* v. *Gray Eagle Co.* 21 M. R. 663.

A protestant who has no surface conflict cannot appeal. *Smuggler Co.* v. *Trueworthy Lode*, 19 L. D. 356.

An adverse relocation pending an order to hold original claim for cancellation gives the relocator no standing to be heard. *Id.*

Certiorari is entered only where applicant has no right of appeal. *In re Currency Co.* 20 L. D. 178. *Ground Hog Lode*, 20 L. D. 211.

Department will not relieve against mere negligence of protestant. *Hopely* v. *McNeill*, 20 L. D. 87.

A discovery of mineral is a statutory prerequisite to location and

CALDWELL, Circuit Judge. The bill in this case seeks to have it decreed that the defendant company holds the legal title to certain lode mining claims in trust for the plaintiff, and prays that it may be required to convey the same to the plaintiff. The theory of the bill is that the plaintiff has the equitable title to certain lode mining claims, which, after due and regular proceedings had for that purpose, were entered and paid for, and afterwards patented to defendant company. The circuit court sustained a demurrer to the bill (111 Fed. 655), and the plaintiff appealed.

The material facts disclosed by the bill essential to be considered in deciding the case are: That the defendant company, the Champagne Mining & Milling Company, in April, 1896, was the owner of four lode mining claims, known as Deadwood No. 1, Deadwood No. 2, Deadwood No. 3, and Deadwood No. 4, and on the 25th day of April of that year filed its application for a patent for the same, and published and posted the notice of such application required by

want of such discovery is sufficient to base a protest. *Waterloo Co.* v. *Doe*, 17 L. D. 111. *Etling* v. *Potter*, 17 L. D. 424.

A protestant with an adverse interest is entitled to an appeal. *Nevada Lode*, 16 L. D. 532. *Opie* v. *Auburn M. Co.* 29 Id. 230.

Allegations of non-compliance with mining law (for instance, expenditures under $500), may be investigated, *Hughes* v. *Ochsner*, 27 L. D. 396; although protestant's claim not located until after entry. *Tam* v. *Storey*, 16 L. D. 282.

The issue is solely between the government and the entryman where protestant shows no interest in the land. *Adams* v. *Quijada*, 25 L. D. 24.

Department may stay actions, pending judicial proceedings, even though proceedings are based upon a protest not requiring an adverse suit. *Thomas* v. *Elling*, 26 L. D. 220.

One who fails to adverse cannot maintain protest on ground that applicant's discovery is on protestant's land. *Am. Cons. M. Co.* v. *DeWitt*, 26 L. D. 580. *Mutual M. Co.* v. *Currency Co.* 27 *Id.* 191. *Hughes* v. *Oschner*, *Id.* 396.

A protest alleging failure to keep up the annual labor pending adverse claim proceedings does not present matters which call for investigation by the department. *Marburg Lode*, 30 L. D. 202.

law. To this application for a patent adverse claims and protests were filed, but neither an adverse nor protest was at that time filed by the plaintiff in this suit or any one by or under whom he claims. The several adverse claims and protests prevented the defendant company's application for a patent being passed to entry until the 18th day of February, 1899, when the defendant company was adjudged to have the right to enter the mining claims under its application for a patent, and thereupon on that day it paid the receiver of the proper land office the purchase money for the same, and received the usual receiver's certificate of entry therefor, being mineral entry No. 1,957, upon which a patent was afterwards duly issued and delivered to the defendant company.

The averments of the bill upon which the plaintiff relies to sustain his contention that the defendant company holds the legal title thus acquired to these lode mining claims in trust for the plaintiff, to whom it should be required to convey them, are: That on May 1, 1899, the plaintiff discovered lodes or veins in rock bearing gold on these several lode mining claims, and that he sunk discovery shafts and did all other things essential to the valid location of lode mining claims under the law; and that on June 9, 1899, he filed in the proper land office his "protest" against the issuance of a patent to the defendant company under its entry, and on June 16, 1899, an additional protest, and on June 29, 1899, an amended protest. These several protests alleged, in substance, that the defendant company had, prior to its entry of these mining claims, to wit, during the years 1897 and 1898, failed to make the annual expenditure of $100 in labor or improvements thereon required by section 2324 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1426], and had also failed to expend thereon $2,000 in labor and improvements prior to the date of the defendant company's entry. These protests, with the accompanying

affidavits, were by the local land officers transmitted to the commissioner of the general land office, by whom they were dismissed, and, on appeal to the secretary of the interior, this ruling was, on February 12, 1900, affirmed, in a very clear and satisfactory opinion, made part of the plaintiff's bill.

The plaintiff did not adverse the defendant company's application for a patent, and did not file his protest against the issuance of a patent, until after the defendant company, at the end of a long litigation in the land department with others, had been adjudged to be the rightful owner of the mining claims, and entitled to enter the same and to receive a patent therefor, and had paid the entrance price and received a certificate of entry.

The first question that we find it necessary to consider is what rights, if any, the plaintiff acquired by protesting against the issuance of a patent to the defendant company under its entry. This question was fully considered by Mr. Justice Brewer while circuit judge of this circuit in the case of *Wight* v. *Du Bois* (C. C.) 21 Fed. 693, 696. Referring to and construing the statute, the learned judge said:

"It becomes necessary to see what rights this last clause gives. I think all that it covers is the right to anybody to come in and enter his protest or objection; in other words, to say to the officers of the government that the applicant has not complied with the terms of the statute, and to insist that there shall be an examination by such officers to see if the terms have in fact been complied with. He does not appear as a party asserting his own rights; but if we may, so to speak, parallel these proceedings with those in a court, such an objector appears as an *amicus curiæ*,—a friend of the court,—to suggest that there has been error, and that the proceedings be stayed until further examination can be had. Such a protest does not bring the protestant into court for the assertion of his own title or rights; does not revivify rights lost by a failure to adverse. True, if the protest or objection is sustained, the proceedings will be set aside, new ones must be commenced, and then the objector may be in a position to assert his rights; but if the protest or objection be not sustained the objector, like an *amicus curiæ*, has nothing more to say in the matter. In other words, the right to protest is not

the right to contest. The latter is lost by the failure to adverse. The former remains open to everyone, holders of adverse claims as well as others. But the protest is only to the officers of the government, challenges only the applicant's claims, and in no manner brings up for consideration any claims of the protestant. Such a protest can be made only before the land department, and, if there rejected, the protestant has no further standing to be heard anywhere. The protest cannot be made the basis of any litigation in the courts, for the courts are only open to those who have rights to assert; they sit for the determination of controversies. They do not, at the instance of strangers, review the regularity of proceedings between parties who are competent to determine such regularity, and who do not themselves invite any judicial determination."

It is well settled that when the purchase price is paid for government land to the local land office authorized to receive the same and allow the entry, and a certificate of purchase is issued to the purchaser, the right to a patent immediately attaches, and when the patent is subsequently issued it relates back to the inception of the right of the patentee. The certificate of entry invests the purchaser with the full equitable title to the land, and so far as the acquisition of title after that by any other person is concerned is equivalent to a patent. *Duffeback* v. *Hawke,* 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423; *Benson M. & S. Co.* v. *Alta M. & S. Co.* 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762; *Calhoun Gold M. Co.* v. *Ajax Gold M. Co.* 182 U. S. 499, 21 Sup. Ct. 885, 45 L. Ed. 1200.

This court, following the well-settled rule on the subject, has held that one who has not acquired a right to government land before its sale by the government cannot, after its sale, maintain a suit in equity to charge the purchaser of the land from the United States with a trust in his favor, upon the ground that the United States sold it to the purchaser through an error of law. *Hartman* v. *Warren,* 76 Fed. 157, 22 C. C. A. 30.

When the certificate of entry was issued to the defendant company the plaintiff was an entire stranger to the proceed-

ings. He neither had nor claimed to have any kind of right or interest in and to these mining claims. He had taken no step to initiate a right or claim to them, and after the government had parted with its title to them it was too late for him to do so. It was not until after the defendant company had been adjudged to have the right to enter the land, and the entrance money had been paid and a certificate of entry issued, that the plaintiff filed his protest against the issuance of a patent to the defendant company. Granting that a stranger may "protest" against the issue of a patent, he acquires thereby no right or equity in the land which can be made the basis of an equity suit to annul the patent or to charge the patentee as a trustee of the legal title for the protestant.

At the time the defendant company made application for a patent and at the time it paid for and received the certificate of entry for the mining claims the plaintiff does not claim to have done anything to invest him with any right or claim to the land. Previous to the time the defendant company paid the entrance money for the land and received the certificate of purchase, all the adverse claims and protests that had been filed against the issuance of a patent to the defendant company had been dismissed by the land department. The only parties, therefore, having any concern with or interest in the entry at the time it was made were the United States as the owner of the land, and the defendant company as the purchaser; and if the United States was satisfied of the right of the defendant company to purchase the land, and sold and conveyed it to the defendant company accordingly, no one not then having any right, claim, or equity in the land, but whose relation was that of a total stranger to the proceedings, can afterwards assume the role of guardian for the government, and by a mere protest invoke the aid of a court of equity to set aside and annul its conveyance for alleged errors and mistakes which in no manner affect any

right of the protestant existing at the time of the sale, and after the sale and conveyance it was too late to initiate or acquire any such right.

The decree of the circuit court is affirmed.

[1]UINTA TUNNEL MINING & TRANSPORTATION CO. v. CREEDE & CRIPPLE CREEK MINING & MILLING CO.

(119 Federal 164. Circuit Court of Appeals, Eighth Circuit. November 18, 1902.)

[2]**Tunnel site need not adverse lode claim.** The claimant of a tunnel site located across lode claims is not required by sections 2325, 2326, Rev. St. [U. S. Comp. St. 1901, pp. 1429, 1430], to file an adverse claim, when applications for patents of the lode claims are made, in order to protect his rights in those cases in which his interest in the lode claims is so uncertain, contingent, and intangible that it cannot be fairly litigated when the applications are made.

Lode patents subject to rights of tunnel sites located before the entries. Patents of lode mining claims based on entries made after the location of a claim for a tunnel site across them are subject to the rights of the claimant of the tunnel site in cases in which his rights therein were so uncertain, contingent, and intangible that they could not be fairly litigated when the applications for the patents were made.

[3]**Land office rulings not binding on persons not parties.** The judgments of the land department permitting entries of land and the patents based upon those entries bind all the parties to the proceedings which resulted in them and all those claiming interests acquired from such parties subsequent to the entries. But they do not estop those who were not, and were not required to be, parties to the proceedings from establishing by the customary evidence the truth relative to any fact material to their claims in any litigation between them and the holders under the patents.

Tunnel may attack the discovery of the patented lode. Entries and patents of lode mining claims in proceedings to which a claimant of a tunnel site, located across them prior to the entries, was not, and was not required to be, a party, will not estop him from establishing by the testimony of witnesses who know, and by other customary evidence, the fact that no discoveries of lodes or mines

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[1]Affirmed, 196 U. S. 337.

[2]*Enterprise Co.* v. *Rico Aspen Co.* 18 M. R. 661.

[3]Land office adjudications on question of fact are final. *Jeffords* v. *Hine*, 15 M. R. 575. *Aurora Hill Co.* v. *85 Co.* Id. 581.

One who, at the time when patent issues, has no claim to the land, has no standing to attack the patent. *Peabody Co.* v. *Gold Hill Co.* 21 M. R. 591.

of mineral had been made in the lode claims before the claim for the tunnel site was located across them.

[4]Certificates of location of mining claims are not conclusive evidence of the facts which they recite against parties who claim the land they describe adversely to their makers.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Colorado.

The writ of error in this case challenges the trial of an issue involving the rights of the respective parties to the action to the possession of the space within the bore of a tunnel where it passes through two lode mining claims beneath the surface of the earth. The Creede & Cripple Creek Mining & Milling Company was the plaintiff, and the Uinta Tunnel Mining & Transportation Company was the defendant, in the action below, and they will be so styled in this statement and in the opinion which follows. The plaintiff was the owner of two lode mining claims, called the Ocean Wave and the Little Mary, which were entered for patent on August 5, 1892, and were patented on December 21, 1893. The plaintiff alleged in its complaint that these claims were duly located and discovered on January 2, 1892. The defendant was the owner of a claim to a tunnel site which extended through these lode claims beneath the surface of the earth, and which was located on January 13, 1892. It also owned certain lode claims which had been located on blind veins that had been discovered in the tunnel after the lode claims of the plaintiff had been patented. The mining claims of the plaintiff were between the portal of the tunnel and the defendant's lode claims, and the latter had driven its tunnel through the plaintiff's claim, and was using it as a way to bring to the surface of the earth the ore it was extracting from its blind veins. The real issue was whether or not the defendant had the right of way along the bore of its tunnel through the lode claims of the plaintiff, and the determination of this issue depended upon the priority of their respective claims. The plaintiff asserted that its claims were discovered and located on January 2, 1892. The defendant averred that its tunnel was located on January 13, 1892, and that no discovery of mineral in rock in place was made within the lode claims of the plaintiff until after its tunnel site was located. These averments of the defendant were stricken from the answer, and the evidence which it offered to sustain them was rejected. Exceptions

[4]Lindley, 2nd Ed. § 392. Mining Rights, 12th Ed. 324.

were taken to these rulings, and there was a verdict and judgment for the plaintiff.

GERALD HUGHES and SCOTT ASHTON (CHARLES J. HUGHES, JR., on the brief), for plaintiff in error.

H. H. LEE (C. S. THOMAS, A. T. GUNNELL, W. H. BRYANT, T. M. PATTERSON, E. F. RICHARDSON, and H. N. HAWKINS, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

When the claim to a tunnel site has been located before the entry of the conflicting lode mining claims which have subsequently passed to patents, is the question whether discoveries of mineral in rock in place were made within the lode claims before the location of the claim to the tunnel site open to determination by means of evidence or testimony dehors the patents? This is the principal question presented by this record. If the query were whether or not it is competent to show by proof outside the receiver's receipts or the patents that there had been no location of the patented claims or no discovery of the lodes therein before they were entered for patent, there would be no doubt that a negative answer must be returned to the question for the reason that this is an issue between the parties to a proceeding before the land department which that tribunal necessarily considers and decides when it permits the entries of the lands, and its decisions of questions within its jurisdiction are impervious to collateral attack. *King* v. *McAndrews,* 111 Fed. 860, 863, 50 C. C. A. 29, 32. This was the question which the supreme court answered in *Calhoun Gold M. Co.* v. *Ajax Gold M. Co.* 182 U. S. 499, 502, 503, 510, 45 L. Ed. 1200; and while, if the language of the opinion in that case is carelessly read

without knowledge of or reference to the question actually before the court, it may seem to be broader, a careful examination of the facts which the record there discloses demonstrates the proposition that the decision went no further. In that case the receiver's receipts on the lode claims of the appellee had been issued before the claim to the tunnel site was located. Page 502, 182 U. S., and 45 L. Ed. 1200. In a proceeding between the lode claimants and the United States the land department had decided that mineral in place had been discovered within the claims and had permitted their entry. Subsequent to this decision and to these entries the owner of the claim to the tunnel site located it across the lode claims, and upon the trial offered to prove that there had been no discovery of mineral in place within those claims before they were entered. The trial court rejected the offer. The supreme court said: "The ruling was right. The patents were proof of the discovery, and related back to the date of the locations of the claims. The patents could not be collaterally attacked." Thus, it may be seen that the only proposition there decided was that one who had initiated no claim upon lands when they were entered by other claimants could not subsequently collaterally attack the decision of the land department that there had been a discovery of mineral in place upon the claims at some time before they were entered.

Counsel for the plaintiff rely upon the decision and opinion in this case, and insist that it fairly sustains the rulings of the court below. But there are radical and controlling differences between the question presented in that case and the issue of law before us in the case in hand.

1. A judgment is binding upon the parties to the proceeding in which it is rendered and upon their privies. The parties to the judgments of the land department by which it allowed the entries of the lode claims in the case of the gold mining company were the United States and the owners

of those claims. No other parties had or claimed any interest in the land at the time those entries were made. The judgments and the patents accordingly bound and estopped these parties and their subsequent assignees. They estopped all parties who initiated claims upon or interests in the lands under either of the parties to the proceeding subsequent to the judgments of the land department. The claimant of the tunnel site in that case initiated its claim under the United States, one of the parties to that proceeding, subsequent to the judgments. It was therefore a privy of the United States, and was estopped by the judgments of the land department from proving that no discoveries had been made upon the lode claims before these judgments were rendered. This is not the case in the action before us. The claim to the tunnel site was located on January 13, 1892. The judgments of the land department allowing the entries were rendered on August 5, 1892. At that time there were three parties interested in the land—the lode claimants, the United States, and the claimant of the tunnel site. Two of these parties, the lode claimants and the United States, were parties to the proceedings, and were estopped by the judgments and the patents. One of them was not a party to any of these proceedings, to the judgments, or to the patents, and, upon familiar principles, was neither bound by them nor estopped by them from presenting and proving according to the established rules of evidence in trials under the common law the fact that no discoveries had been made on the lode claims before the location of its tunnel site, the fact essential to the validity of its claim upon and interest in the land.

Not only was the claimant of the tunnel site not a party to the proceedings in the land department which resulted in the entries and patents to the lode claims, but it was neither required to become such a party nor to submit its claims and interests in the lands to the adjudication of that department at that time because its rights therein were then too uncer-

tain, contingent, and intangible for determination. When the applications for the patents of the lode claims were filed, the blind veins which have induced the use of the tunnel through the lands in controversy had not been discovered, the tunnel had not been driven into the land, and it was impossible to know whether or not the claimant of the tunnel site would ever acquire any right to use this land for the purpose to which it is now devoted. The claimant of a tunnel site is not required by sections 2325, 2326, Rev. St. [U. S. Comp. St. 1901, pp. 1429, 1430], to file an adverse claim and submit his rights in the lode claims it crosses to adjudication by the land department upon the filing of applications for patents to those claims when his rights are at that time uncertain, contingent, and intangible. *Enterprise M. Co.* v. *Rico-Aspen Cons. M. Co.* 167 U. S. 108, 112, 17 Sup. Ct. 762, 42, L. Ed. 96; *Enterprise M. Co.* v. *Rico-Aspen Cons. M. Co.* 13 C. C. A. 390, 399, 400, 66 Fed. 200, 209, 210.

2. The issue whether the discoveries in the lode claims were made before the location of the tunnel site in the Ajax Gold Min. Co.'s Case was necessarily considered and adjudged by the land department when it permitted the entries of the lode claims. The finding that such discoveries had been made before the date of the entries was indispensable to the decision that the lode claimants were entitled to make the entries so that that finding must have been made by the department. But the location of the tunnel site in that case was subsequent to these entries. Hence the finding that the discoveries were made before the entries was necessarily a finding that they were made before the location of the tunnel site, and it was, as we have seen, binding upon the claimant of the tunnel site, because it was claiming a right initiated after this adjudication under a party to the judgments.

It is not so in the case before us. The question here is whether or not discoveries were made in the lode claims prior to January 13, 1892, the date of the location of the claim

to the tunnel site. The determination of this question was neither indispensable nor material to the adjudication made by the land department on August 5, 1892, that the lode claimants were entitled to enter the land, and there is nothing to show that this issue was ever considered or decided by that department in reaching its conclusion. The only question relative to the discoveries that it was required to determine was whether or not they had been made prior to August 5, 1892, when the entries were permitted, and the decision of that question left entirely untouched the issue in this case whether they were made before or after the location of the tunnel site on January 13, 1892.

3. When the entries were made in the *Ajax Gold M. Co.'s Case* no claim to a tunnel site had been located or staked upon or across the lode claims and the entries of them, and the patents to them vested the title in the claimants free from any right or claim to a tunnel site. It is otherwise in the case at bar. The claim to the tunnel site was located and staked out across these lode claims before they were entered. Under the Revised Statutes and the law the entries and patents of these claims vested the title to them subject to the rights of the prior claimant of the tunnel site just as they vested it subject to the right of an owner of an adjoining lode claim to follow on its dip through a side line and through the patented territory of these lode claimants any vein which has its apex in his claim. *Enterprise M. Co.* v. *Rico-Aspen Cons. M. Co.* 13 C. C. A. 390, 400, 66 Fed. 200, 210; *Mining Co.* v. *Campbell,* 135 U. S. 286, 301, 10 Sup. Ct. 765, 34 L. Ed. 155; *Hall* v. *Equator Co.* Mining Rights, (3d Ed.) p. 282; *Branagan* v. *Dulaney,* 8 Col. 408, 412, 8 Pac. 669; *Lee* v. *Stahl,* 9 Colo. 208, 210, 11 Pac. 77; *Morgenson* v. *Milling Co.* 11 Colo. 176, 179, 17 Pac. 513.

While, therefore, it is a flagrant attack upon a patent to attempt to maintain a claim initiated subsequent to the entry on which it rests, it is no such attack to assert the rights

of the claimant of a tunnel site located before the entry of the land against a patent of it to a lode claimant, because under the statutes and the law such a patent always issues subject to those rights.

Notwithstanding all these considerations counsel for the plaintiff insist that the defendant is estopped from pleading and proving that no discoveries of mineral in place were made in the lode claims before the location of the tunnel site on January 13, 1892, because certificates of location of the lode claims were filed on January 2, 1892, which declare that such discoveries were made on that day, and it is a well-settled principle that patents relate back to and take effect upon the dates of the initiation of the rights on which they are founded.

But the certificates of location are not conclusive proof of the facts which they recite against those asserting rights adverse to their makers. They are competent evidence of the fact that they were made and filed, and hence of an important link in the chain of the plaintiff's title. But when the existence of the facts which they recite is challenged they are but the ex parte statements of interested parties, and there is nothing in them or in their relation to the property or the parties to bind those claiming the lands adversely to their makers or to estop them from establishing the truth by the customary oral and written evidence. Nor is there anything in the doctrine of relation to work such an estoppel. Grant that the patents relate back and take effect as of the date of the initiation of the lode claims, yet since the patents are subject to the rights of the claimant of the tunnel site when they are issued they are still subject to those rights when they have related back to the inception of the claims upon which they rest.

Moreover, the averment of the defendant is that no discoveries were made in the lode claims until after the location of its claim to the tunnel site. If this allegation is true, it

may be doubted whether the lode claims can be said to have been initiated before the claim for the tunnel site was located. "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Rev. St. § 2320; *Enterprise M. Co.* v. *Rico-Aspen Cons. M. Co.* 167 U. S. 108, 112, 42 L. Ed. 96. It is true that subsequent discoveries may validate earlier locations, and that the latter may then inure to the benefit of the locators as against the United States and all parties whose claims were initiated subsequent to the discoveries. But they would inure to their benefit as of the dates of the discoveries, and not as of the dates of the locations, and they would neither destroy nor affect intervening rights. The marking of boundaries and filing of location certificates may precede discovery or discovery may precede them, but no location is valid until both are complete. The earlier act then inures to the benefit of the locator as of the date of the latter, subject to all rights which have intervened between them. *Erwin* v. *Perego,* 93 Fed. 608, 611; *Jupiter M. Co.* v. *Bodie Cons. M. Co.* 11 Fed. 666, 676; 4 Morr. Min. R. 411, 423; *North Noonday M. Co.* v. *Orient M. Co.* 1 Fed. 522, 531; *Zollars* v, *Evans,* 5 Fed. 172, 175; *Strepy* v. *Stark* (Colo.) 5 Pac. 111, 114; *Thompson* v. *Spray,* 72 Cal. 528, 533, 14 Pac. 182; *Erhardt* v. *Boaro,* 113 U. S. 527, 536. There was therefore no valid location of the lode claims until the discoveries within them were made, and it is held by the circuit court of appeals of the Ninth circuit in *Last Chance M. Co.* v. *Tyler M. Co.* 61 Fed. 557, 565, that a patent for a mining claim only relates back to the time when a valid location was first made. If this is a correct view of the law, the patents in this case could not relate back to a time anterior to the dates of the discoveries, and if those were subsequent to the location of the tunnel site they could not affect defendant's rights.

If litigation for the possession of the property in con-

troversy in this action had arisen between the lode claimants and the claimant of the tunnel site at a time prior to the entries of the lode claims, the question whether or not discoveries of mineral in place had been made in the lode claims before the location of the tunnel site would have been decisive of the issue, and the testimony of witnesses who knew the facts and other evidence competent in the customary trials of such issues at law would have been admissible to determine the question. What is there in the entries and the patents to deprive the defendant of its right to try this issue now upon like evidence? Its claim to this land had attached before those entries were made. It was not a party to the proceedings in the land department which resulted in the adjudication that the lode claimants were entitled to enter it. It was not required to file an adverse claim and to submit its rights to the adjudication of that department when the applications for the patents were made. The adjudication of the land department which permitted the entries was *res inter alios acta* and ineffectual to estop the defendant. The department was not required to determine and it did not decide the question here at issue, and under the statutes and the decisions of the federal courts the entries and the patents were made subject to the rights of the claimant of the tunnel site which had attached before the land department permitted the entries. Our answer to the question which this case presents is that when the claim to a tunnel site has been located before the entry of conflicting lode claims, which have subsequently passed to patents, the question whether discoveries of mineral in place were made in the lode claims before or after the location of the claim to the tunnel site was perfected is open to determination by means of the testimony of witnesses and other competent evidence dehors the patents in any litigation between the parties involving their conflicting claims. *Last Chance M. Co.* v. *Tyler M. Co.* 61 Fed. 557, 565, 567; *Champion M. Co.* v. *Cons. Wyoming M. Co.*

75 Cal. 78, 16 Pac. 513; *Iron Silver M. Co.* v. *Campbell,* 135 U. S. 286; *Davis* v. *Weibbold,* 139 U. S. 507.

The averments that no discoveries of mineral in place within the lode claims had been made before the location of the claim to the tunnel site should not have been stricken from the answer of the defendant and its evidence to sustain them should have been received. The question which has been considered is decisive of the issue whether or not the judgment below should be affirmed, and, as the other questions presented by the assignment of errors may not arise again, they will not now be considered.

The judgment below must be reversed, and the case remanded to the court below, with directions to grant a new trial; and it is so ordered.

J. B. BROOKS ET AL. v. THOMAS L. COOK ET AL.

(135 Alabama 219; 34 So. 960. Supreme Court. November 26, 1902.)

[1]**Implied covenant that the mineral exists.** Where a mining lease gave defendants the right to mine at an agreed royalty, binding them to a minimum tonnage per month and after exhaustive search no ore in paying quantities was found: *Held*, that the lease contained an implied covenant that such was to be found in the ground and that no royalty was recoverable.

Appeal from City Court of Talladega; G. K. MILLER, Judge.

Action by Thomas L. Cook and others against J. B. Brooks and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

This was an action to recover $75, the amount of five months' royalty alleged to be due upon the lease executed by the plaintiffs to the defendants, by which lease the plaintiffs granted to the defendants the right and privilege to mine all iron ore in and under certain designated lands. The defendants pleaded the general issue, and also interposed by special pleas the defense that said contract of lease was based upon the supposition, indulged in by the parties thereto, that the lands described in said lease contained iron ore in merchantable quantities, but that as a matter of fact, after diligent and faithful digging and search, it was ascertained that said lands did not contain iron ore in merchantable quantities, and were entirely valueless so far as iron ore being contained therein was concerned, and that, therefore, the defend-

[1] *Fritzler* v. *Robinson*, 17 M. R. 105. *Blake* v. *Lobb's Est.* 18 M. R. 462. *Diamond Co.* v. *Buckeye Co.* 19 M. R. 197. *Hewitt* v. *Dessau Co.* 22 M. R. 111.

ants did not mine said ore, and hence the defendants were not owing the royalty stipulated in the contract of lease.

The plaintiffs demurred to the special pleas setting up this defense, upon the ground that said pleas presented no defense to the action sued on. These demurrers were sustained, and to this ruling the defendants duly excepted. The plaintiffs offered in evidence the lease under which they claimed the amount sued for, which lease was in words and figures as follows:

"State of Alabama, Talladega County.—Whereas, Thos. L. Cook, Mary E. Cook, wife of R. E. Cook, and Mrs. Maria L. Gorman are the owners of a certain tract of land lying and being in Talladega county, Ala., and more particularly described as follows, to wit, the S. ½ of S. E. ¼ of section 9, township 19, range 4, supposed to contain iron ore;

"And, whereas, Richard E. Cook is duly authorized and empowered by them to lease the mineral rights in said land under certain conditions and stipulations; and, whereas, J. B. Brooks, J. B. Stagg, and W. C. Stagg, a firm acting and doing business under the firm name of Brooks, Stagg & Co., do enter into the following agreement, to wit: The said mineral rights and privileges only are to be let to parties of second part.

"First, R. E. Cook, party of the first part, agrees and binds himself to lease to the said party of the second part as follows, to wit: The mineral rights and privileges on said land from this date for a term of ten (10) years, in consideration of one dollar to him in hand paid, the receipt whereof is hereby acknowledged, and the further consideration of a faithful compliance by the party of the second part with the terms and condition hereinafter mentioned, the parties of the second part agree to mine and pay for at a royalty of 15 cents per standard ton of not less than 100 tons per month during the continuance of this contract, on the 20th day of each month, for all ore mined the previous month, except for the first month. A failure to comply with the foregoing agreement to pay at the rate of 100 tons per month will render this lease void and of no effect so far as the party of the second part are concerned And party of the first part, for his principals, reserves the right to take possession of the mine and ore mined, either on the bank, the railroad, or the furnace, and sell the same, either by private sale or otherwise, and out of the proceeds pay all sums due his principal, and, should anything remain over after paying all le-

gitimate cost and expenses of such sale, and amounts due for royalty to his principals, pay over to the party of the second part the remainder, and may take possession of the mines, with all tools and fixtures. It is agreed and understood that no unnecessary damage is to be done to the agricultural interest on said lands, and that the parties farming said land will not be unnecessarily interfered with by the parties of the second part. It is agreed that the railroad weights shall govern in the settlement of the royalty at all times when practical, and that the party of the first part shall have at all times free access to the mines to see after the business for his principals, and shall be furnished by the party of the second part weekly statements of number of cars shipped, with the initials of number of cars, and to what furnace consigned. The party of the first part agrees to furnish rights of way to and from the mines to the railroad, on a route to be agreed upon by the parties to this contract, for all the ore which the said Cook has or may acquire an interest in, and the party of the second part agree that they will not ship or attempt to ship over said right of way any other ore save that which the said Cook may agree now or hereafter agree to.

"We also agree to execute to Cook & Sawyer a note for eighty dollars ($80) for the rent of what is known as the 'undivided forty,' they reserving water privileges, and the right to and from the spring. Said note payable the 1st day of December, 1900, and is referred to as a part of this contract. And should the parties to this contract agree to extend the time of renting, then in that event the party of the second part are to execute their notes annually on each 1st of December to cover the rent of the next year's ore. Any failure to comply with this contract will render the note due and payable at the time of the forfeiture of this contract, to all of which we agree and bind ourselves this, the 18th day of January, 1900."

This lease was signed by "R. E. Cook, Agt.," and the defendants individually. During the trial of the case, the defendants offered evidence to prove that there was no iron ore in merchantable quantities in the lands leased. The plaintiffs objected to the introduction of this evidence, which objection the court sustained, and to each of these rulings the defendants duly excepted. The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

Upon the introduction of all the evidence, the court at the

request of the plaintiffs gave to the jury the following written charge:

"The court charges the jury that, if they believe the evidence, they must find for the plaintiffs for the amount sued for, to wit, $75, with interest from the 26th day of July, 1900."

The defendants duly excepted to the giving of this charge. There were verdict and judgment for the plaintiffs, fixing their recovery at $86.50. The defendants appeal, and assign as error the several rulings of the trial court to which exceptions were reserved.

DRYER & WEBB, for appellants.

KNOX, BOWIE & BURR, for appellees.

TYSON, J. The lease upon which the plaintiffs predicate their right of recovery is simply a grant to the defendants of the right and privilege to mine all iron ore in and under the land designated therein as belonging to the plaintiffs for a period of ten years. For this right the plaintiffs were to be compensated by a royalty of 15 cents to be paid to them by defendants upon every standard ton of ore mined; the defendants obligating themselves to mine not less than 100 tons per month. This action is to recover five months' royalty of $15 each.

It is conceded in argument by both sides that the important question presented is whether the defendants should be allowed to show in defense of the action that the land contained no ore. It is insisted by plaintiffs that this cannot be done, because there is no implied covenant or warranty that the land contained minerals. Doubtless it was upon this theory that the trial court sustained demurrers to the several pleas of defendants invoking this defense, and excluded the testi-

mony offered to show that fact. We have but to call attention to the recitals of the lease to see that the payment of royalty was based upon the assumption of the parties that ore existed under the land. The grant was of the ore in place, and, if the subject-matter of the contract failed, the price is not payable. Indeed, it is expressly stated in the lease that the lands designated therein as belonging to plaintiffs, and which the defendants are granted the right to mine, are "supposed to contain iron ore." When this recital is taken in connection with the fact that the plaintiffs were to be compensated for the right and privilege of mining this ore by a royalty, we do not see how it can be held otherwise but that the contract was made upon the assumption of the parties that ore existed in the land. This being true, when it became manifest that the parties were mutually mistaken, the contract obligation ceases.

It will be observed that no other compensation for the right to mine the lands was stipulated for, except royalty. The plaintiffs thus hazarded their right to compensation upon the existence of ore, as did the defendants hazard the expense of making diligent search for it, as was their duty under the lease. If, however, it is established by actual and exhaustive search that at the time the contract was made there was in fact no ore in the land, upon no fair and reasonable construction of the contract can the defendants be held liable for royalty. How is it possible for them to be in default in mining 100 tons of ore monthly, if there was no ore to mine? We are not to construe the contract to require the lessees to do an impossible thing; and to require them to pay royalty on ore which never had any existence, and which it was not possible for them to mine, would be to require the impossible—to compensate the plaintiffs for a thing which they undertook to sell, but which they never owned, indeed, which never had any existence. For, after all, the lease was nothing more nor less than a sale by them of iron ore, which they

supposed they owned, hidden, it is true, under the earth—a supposition also indulged by the lessees. But, if both were mistaken in their supposition as to the existence of the ore, then the obligation of the lessees to mine, upon a discovery of this mistake, was at an end, as was likewise their obligation to pay royalty upon the ore to be mined. Similar leases have been construed by other courts, and the principles we announce have been applied, and the point under consideration expressly decided. *Muhlenberg* v. *Henning,* 116 Pa. 138, 9 Atl. 144; *Kemble Iron Co.* v. *Scott,* 15 Wkly. Notes Cases, 220; *Blake* v. *Lobb's Estate,* 110 Mich. 608, 68 N. W. 427; *Gribben* v. *Atkinson,* 64 Mich. 651, 31 N. W. 570; *Brick Co.* v. *Pond,* 38 Ohio St. 65; *Cook* v. *Andrews,* 36 Ohio St. 174; *Clifford* v. *Watts,* L. R. 5 C. C. P. 576.

Reversed and remanded.[1]

[1]Again reversed on other grounds, 38 So. 641.

THE CERRUSITE MINING CO. v. EDWIN J. STEELE.

(18 Colorado Appeals 216; 70 Pac. 1091. Court of Appeals. December 8, 1902.)

It is within the powers of general manager to make contract to protect the board and store account out of the miners' wages.

Written followed by verbal contract. A written contract in general terms between the defendant company and its boarding house keeper was followed by a verbal contract in specific terms. A suit on such state of facts is based on the verbal contract.

The Statute of Frauds must be specially pleaded.

Where a mining company deducts the board account from the miners' wages it becomes a debtor to the boarding house keeper for money had and received to its use.

Appeal from District Court, Arapahoe County.

Action by Edwin J. Steele against the Cerrusite Mining Company. Judgment for plaintiff. Defendant appeals. Affirmed.

MESSRS. MCGINTIE & ANDREWS, for appellant.

A parol promise by a mining company to pay the board of its miners is not within the statute. *Baldwin Co.* v. *Davis*, 15 Colo. App. 371; 62 Pac. 1041.

Consideration of the truck or labor acts of sundry states with reference to their constitutionality as alleged class legislation or violating the right to make contracts. *Harding* v. *Peo.* 160 Ill. 459; 43 N. E. 624. *State* v. *Fire Creek Co.* (W. Va.) 10 S. E. 288. *Peel C. Co.* v. *State* (W. Va.) 15 S. E. 1000. *Whitebreast Co.* v. *Peo.* 175 Ill. 51; 51 N. E. 853.

Truck act of Tennessee upheld. Labor is property. *Harbison* v. *Knoxville Co.* 103 Tenn. 421; 53 S. W. 955. *Dayton Co.* v. *Barton*, 103 Tenn. 604; 53 S. W. 970.

Sweeping lien for wages in California held void as class legislation. *Johnson* v. *Goodyear Co.* 127 Cal. 4; 59 Pac. 304. See *Skinner* v. *Garnett Co.* 96 Fed. 735.

The Indiana act requiring payment every two weeks in money held valid and an agreement to waive it no defense to suit for wages. *Hancock* v. *Yaden*, 121 Ind. 366; 23 N. E. 253.

MR. ARTHUR M. EDWARDS and MR. GEORGE C. MANLY, for appellee.

WILSON, P. J. The parties to this suit entered into a written contract whereby it was agreed that the plaintiff, Steele, should place a stock of goods and maintain a store at the place where defendant company was conducting mining operations, and that he would also take charge of and maintain a boarding-house at such place for the boarding, at a stipulated price per week, of defendant's officers and employees. The defendant company agreed to furnish a store room, and the boarding-house and utensils connected therewith, rent free. Among the stipulations in the contract was one that defendant "agrees to aid said Steele in collecting board, and in all legitimate ways in sustaining said store and boarding-house." This suit was brought by Steele to recover the amount of the balance alleged to be due to him for the board and store accounts of a number of defendant's employees. Judgment was in his favor for the full amount claimed, and from this defendant appeals.

Regulations applying only to mines employing a certain number of men is not unconstitutional as class legislation. *Com.* v. *Hillside Co.* 22 Ky. L. R. 559; 58 S. W. 441.

Under the Coal Mines' Regulation Act, where the wages are controlled by the weight of coal gotten, the employer has no right to make deductions for slack screened out. *Brace* v. *Abercarn Colliery*, 1 Q. B. 496 (1891); 2. Q. B. 699 (1891).

Wages are the reward of labor and always come by contract express or implied. *Penn. Coal Co.* v. *Costello*, 15 M. R. 47.

Violation of duty relieves the master from contract not to discharge under sixty days' notice. Keeping dissolute women on the premises good ground to discharge. *Moynahan* v. *Interstate Co.* 31 Wash. 417; 72 Pac. 81.

Gold dust extracted by a placer miner held exempt as his "earnings." *Dayton* v. *Ewart*, 28 Mont. 153; 72 Pac. 420.

Illinois truck act, 1891, held class legislation. *Kelleyville* v. *Harrier*, 207 Ill. 624; 69 N. E. 927.

It was shown by the evidence on the part of plaintiff that after putting in the stock of goods and taking charge of the store and boarding-house, but before commencing to operate them or opening any accounts, it was agreed verbally between plaintiff and the general manager of the defendant company that the company would pay to plaintiff the board and store accounts of the employees, and deduct such amount from their wages. That thereafter, in pursuance of this verbal agreement, it was the uniform practice and custom of the parties for Steele to render direct to the company, twice a month, a statement of his account, showing the amount due to him by each employee for board and on store account; that this statement of account was audited by the manager of the company and paid to plaintiff by the company's treasurer. Nine such statements were rendered, audited and paid. Three other statements were rendered and audited by the general manager, but were not paid upon presentation to the treasurer, owing to lack of funds in the treasury, and these are the subject of this suit. It was further shown that Steele never rendered any accounts to the employees, but to the com-

The Kentucky act forbidding blacklisting and requiring prompt payment of mine employees held constitutional and not class legislation. *Com.* v. *Reinecke Co.* 25 Ky. L. R. 2027; 79 S. W. 287.

Full case on proof of hiring of employees by corporation. *Sandberg* v. *Victor M. Co.* 24 Utah 1, 66 Pac. 360.

Where a miner hired by the company employs a laborer under him, for which laborer the company reserves his pay, such laborer has no right of action against the company until the day upon which the company by usage reserves his pay. *Fairfield* v. *Wyoming Valley Co.* 142 Pa. 397; 21 Atl. 874.

Construction of contract for payment of wages out of profits. *Skym* v. *Weske Cons. Co.* (Cal.) 47 Pac. 116.

Plaintiff contracted to mine at 75 cents a ton; he was paid off with the other hands at 65 cents a ton without protest, but claimed special understanding that this was to prevent the other miners from complaining. His recovery was upheld. *Kendrick* v. *Visage*, 88 Ga. 275; 14 S. E. 612.

Owner not liable where mine worked under recorded lease, al-

pany direct, as has been stated, and that the sums due upon the statements of account involved in this suit had been deducted by the company from the wages of the employees. No evidence was offered on the part of defendant.

The oral testimony received with reference to the verbal agreement between plaintiff and the general manager did not tend to vary the terms of the written contract. The latter contained only a general understanding on the part of the defendant to aid the plaintiff in every legitimate manner in the collection of his accounts. There was no attempted specification as to how or in what manner this aid should be extended. As it then stood, it was of no practical or legal effect. Plaintiff could not have maintained an action upon it. The verbal agreement went a step further, but by no means conflicting or varying with the written contract, and provided how this assistance should be rendered. The provision, too, it is a matter of common knowledge, is one customary in enterprises of that character, and one which, nothing appearing to the contrary in the case here presented, was within the scope and authority of the general manager to enter into. The verbal contract was manifestly a separate and independent one, and evidence as to its terms was clearly

though he gave orders and did not mention the lease. *Davidson* v. *Jennings*, 27 Colo. 187; 60 Pac. 354.

Where a party has paid labor tickets in the hands of a buyer, he cannot, without notice, refuse to pay except to the employees themselves as to tickets bought before such notice. *Tabler* v. *Sheffield Co.* 87 Ala. 305; 6 So. 196.

Monthly payments deducting checks for goods held valid under labor act. *Avent Co.* v. *Com.* 16 Ky. L. R. 414; 28 S. W. 502.

The holder of a time check cannot recover after garnishment of the funds under proceedings of which the assignee was cognizant and against which he made no protest. *Drennon* v. *Ross*, 2 Colo. App. 181; 29 Pac. 1041.

Where a statute exempts wages they continue exempt as long as such wages are under control of the debtor, although temporarily in the hands of another. *Elliot* v. *Hall* (Ida.) 31 Pac. 796.

admissible. It is upon this contract the suit is based, and can be maintained.

It is claimed, however, that this agreement was one to answer for the debt of another, and hence, not being in writing, came within the inhibition of the statute of frauds. The evidence shows the undertaking was primary, not collateral. *Coal Co.* v. *Lidell,* 69 Ill. 640. Conceding, however,—which we do not,—that it was an agreement to answer for the debt of another, it can avail defendant nothing. For one reason, and a conclusive one, the statute was not pleaded. *Hamill* v. *Hall,* 4 Colo. App. 296. For another, equally conclusive, it appears that the defendant had withheld from the wages of its employees, and therefore collected, the amounts due in money to plaintiff upon these several statements of account, and instead of paying it over to plaintiff, had retained it. It became, therefore, so much money received by it to the use of plaintiff, and having received and retained it, the debt became its own, and not that of another. *Hamill* v. *Hall, supra.*

There was no stipulation that the testimony given by a witness on the trial of the cause in the county court should be proved on the trial in the district court by the notes of the official reporter of the county court, and it was not error to exclude such offer.

The judgment will be affirmed.

Affirmed.

I. P. BUCK v. W. C. JONES ET AL.

(18 Colorado Appeals 250; 70 Pac. 951. Court of Appeals, Dec. 8, 1902.)

[1]**Stock issued in consideration of mining claims at their prospective value, that is, value "which development is necessary to disclose," may be considered paid up although the parties' judgment should afterwards prove to be erroneous.**

[2]**Claim without discovery, void.** The sale of a mining claim, upon which no discovery of mineral has ever been made for stock, to make the stock paid up, is not a case of overvaluation but is a sale where no consideration passes because the deed conveys no title.

Appeal from El Paso County Court.

Action by I. P. Buck against W. C. Jones and another. Judgment for defendants, and plaintiff appeals. Reversed.

MESSRS. TIFFANY HAMILTON & WOODWORTH, for appellant.

MR. GEORGE W. MUSSER, for appellee.

THOMSON, J. The appellant brought this action against two of the stockholders of The Golden Horn Mining and Milling Company, a corporation organized pursuant to the laws of this state, to recover the amount of a judgment previously rendered in his favor against the company. The complaint alleged that the capital stock of the company was fixed by its certificate of incorporation at $1,250,000, divided into 1,250,000 shares of the par value of one dollar each; that the

[1]*Kelly* v. *Clark*, 19 M. R. 431.

Consideration of the rights of stockholders and officers to transfer property to the corporation in exchange for stock. *Garretson* v. *Pacific Oil Co.* 146 Cal. 184; 79 Pac. 838.

[2]*Gemmell* v. *Swain*, 22 M. R. 716.

defendant, Jones, was, at the date of the incorporation, the owner of three mining claims in the Cripple Creek mining district, in this state; that shortly after the incorporation of the company, a certificate embracing its entire capital stock, full-paid and nonassessable, was issued and delivered to Jones in consideration of the conveyance by him to the company of the three mining claims of which he was the owner; that he immediately transferred 400,000 shares of the stock to the company, to be by it sold as fully paid, and, excepting 112,750 shares which he retained, divided the residue among the other incorporators and parties not named; that the mining claims were simple locations on which no work had been performed except that necessary to their location, and in which no mineral had been discovered; that they had no value except as prospects, and were not worth to exceed $1,000; that the defendant Jones paid no consideration for his stock, and was liable to the creditors of the corporation for the difference between its par value and the value of the mining claims; that the other defendant paid no consideration for his stock, and was liable to the creditors of the corporation for its full par value; that for three years before the commencement of the action, no assessment work was done on any of the claims, and by reason of the default, the company lost all its rights to the property, and having no other property, became insolvent; and that on the 18th day of June, 1898, the plaintiff recovered judgment against the company for $300 and costs, execution on which was returned unsatisfied for want of property on which to levy. Judgment against the defendants for $310.25 was demanded.

The only one of the defendants appearing to the action was Jones; and he demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, judgment entered accordingly, and the plaintiff appealed.

Our statute concerning corporations provides that each

stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him. Mills' Ann. Stats. sec. 486.

It provides further that any mining company, organized under its provisions, may, for the purpose of purchasing mining property, issue full-paid stock in payment for it. Mills' Ann. Stats. sec. 582.

The intention of the law is that stock issued by a corporation shall represent value. Persons transacting business with it have a right to rely on its representations; and, to hold itself out as having resources for the discharge of its liabilities which it does not possess, is a fraud upon its creditors. In the case of corporations organized under the laws of this state for the development of mining property, the capitalization may be, and usually is, fixed with reference to prospective value, that is, to value which in the judgment of the parties the property actually has, but which development is necessary to disclose; and if such value is estimated in good faith, we think the stock issued in consideration of a transfer of the property should be regarded as full paid, notwithstanding the parties' judgment should afterwards prove to be erroneous.

But we are informed by this complaint that no mineral had been discovered upon the claims which the defendant transferred to The Golden Horn Mining and Milling Company, and that, excepting those claims, the company had no property. The location of a mining claim must be made on a mineral vein or lode. Revised Statutes U. S. sec. 2322.

The discovery of the vein or lode is an essential prerequisite to a location. There is no valid location without it. Mills' Ann. Stat. sec. 3152.

According to this complaint the defendant received stock in consideration of property to which he had no title. Having made no discovery upon the ground, he acquired no right in it, and his deed to the company conveyed nothing.

By reason of his want of title, any valuation of the property for the purpose of its transfer by him to the company in consideration of stock was an overvaluation. The case made by the complaint, if established by proof, entitled the plaintiff to the judgment he sought, and it was error to sustain the demurrer. Let the judgment be reversed.

Reversed.

MONTANA ORE PURCHASING CO. v. BOSTON & MONTANA CONSOLIDATED COPPER & SILVER MINING CO.

(27 Montana 288; 70 Pac. 1114. Supreme Court. December 24, 1902.)

Dismissal on one cause of action. Plaintiff having complained of trespass for ore taken with a second cause of action to quiet title and for an injunction, may dismiss the trespass count, the causes of action not being dependent on each other.

Trial by jury. A defendant in suit to quiet title to real estate has no constitutional right to trial by jury in Montana. (PIGOTT, J., dissenting.)

Counter presumptions. Where plaintiff proves apex within his claim, and continuity downward, he is entitled to extralateral rights notwithstanding the *prima facie* presumption in favor of defendants' title to everything beneath the surface of his claim.

Facts stand as found below. The appellate court will not disturb the finding of the trial court, made on conflicting evidence, upon the fact questions of apex, dip and strike.

Location certificate when immaterial. Where defendant claimed an intersection of veins in their course downward, but failed to prove such intersection, the exclusion of his location certificate to show that he had the oldest location, becomes immaterial.

Amendment to conform to proof. The trial court has discretionary power to permit the pleadings to be amended at the close of the evidence, to conform to the proof, and to deny a motion for a postponement of the trial therefor. And an amendment slightly changing the ground claimed, but presenting no new issues, does not entitle defendant to a continuance.

[1]**Deed carries apex rights.** A deed to a mining location or a parcel of a mining location, conveys extralateral rights with or without the clauses usually inserted in mining deeds.

[2]**Apex right on subdivided claim.** Where parcel of a mining claim was conveyed by metes and bounds and the end lines of the conveyed portion were not parallel with the end lines of the original location,

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[1]The initial case on this point is *Stinchfield* v. *Gillis*, 17 M. R. 497. See also *Montana Co.* v. *St. Louis Co.* 20 M. R. 507. *Boston Co.* v. *Montana Co.* 89 Fed. 529, cited in the text, is printed in 19 M. R. 480.

[2]On rehearing, 27 Mont. 536, 71 Pac. 1005, this point was modified and the plane fixed by a line drawn from E. on plat parallel with the east end line of the Johnstown location, on consideration of facts leading to the belief that such line was intended as a compromise line.

the extralateral rights of the grantees will be defined by planes drawn parallel to the end lines of the original location at the points where the veins cross the end lines of the part conveyed.

The cost of models, surveys and development work done in preparation of the trial of an apex case cannot be taxed as costs.

That statutory costs are allowed to official stenographers does not authorize the taxation of such disbursement to private stenographers who attended in place of the official stenographer though by consent of parties and of the court.

Objections to the taxation of costs are reviewable on appeal from the judgment, and hence no appeal lies from the order of taxation.

Appeal from District Court, Silver Bow County; WM. CLANCY, Judge.

Action by the Montana Ore Purchasing Company against the Boston & Montana Consolidated Copper & Silver Mining Company. From a judgment in favor of plaintiff, defendant appeals. Modified.

FORBIS & EVANS, WM. SCALLON, THOMAS M. PATTERSON, and A. J. SHORES, for appellant.

MCHATTON & COTTER, JAS. M. DENNY, CHAS. R. LEONARD, ROBT. B. SMITH, TOOLE & BACH, and CULLEN, DAY & CULLEN, for respondent.

BRANTLY, C. J. This action was brought to recover damages for trespass upon a portion of the Johnstown (patented) lode mining claim, situate in Silver Bow county. In a second cause of action the plaintiff asks that its title be quieted to the premises in controversy, and that defendant be restrained from trespassing *pendente lite*, and, upon final decree, that it be perpetually enjoined from trespassing or asserting any right or title to plaintiff's property. Before the cause was set for trial, the plaintiff was, by leave of court, allowed to dismiss the first cause of action without prejudice. The

cause then proceeded as one in equity to determine an adverse claim made by defendant under section 1310 of the Code of Civil Procedure.

The complaint alleges, in substance, that the plaintiff is, and for a long time has been, the owner and in possession of the portion of the Johnstown described, and of all of the veins, lodes, and ledges having their tops or apices therein; that the top or apex of a certain vein, bearing gold, silver, and copper, lying within the surface boundaries of the Johnstown lode, extends through the whole length of the claim, and is substantially parallel with the side lines thereof; that it is intersected by the end lines of the claim, which are parallel; that said apex lies within the lines of the part described, and passes through the east and west end lines thereof; that said vein, in its course downward into the earth, so far departs from the perpendicular as to extend beyond the south side line of the Johnstown claim, and of the premises owned by the defendant within the Johnstown, and into and beneath that certain other claim known as the "Pennsylvania," the greater portion of which is claimed by the defendant; that this claim lies partly adjacent to and south of the plaintiff's premises; that plaintiff is the owner and in possession of said vein or ledge, not only to the extent of those parts of it which lie within the vertical planes extending downward through the surface boundaries of the conveyed portion, but also of all portions lying outside of these planes, and between two planes drawn downward, the one through the east end line of the Johnstown claim, and the other through the west end line of the part described, so extended in their own direction, respectively, as to intersect the exterior portion of said vein beneath the surface of the Pennsylvania claim, and north of a plane extending from the north side line of the said claim at the surface into the earth toward the south at an angle of 40° below the horizon; that all the ores, minerals, and metals lying within said planes are owned

by the plaintiff throughout the entire depth of the vein; that the defendant claims an estate or interest adverse to the plaintiff in those parts of the vein lying outside of the plaintiff's surface lines and beneath the Pennsylvania claim; that this claim of the defendant casts a cloud upon plaintiff's title to such exterior parts of said vein, and interferes with the plaintiff's use and enjoyment of its property; that said assertion of interest by the defendant is without right or title; that the plaintiff's title cannot be quieted or adequately protected by one or more actions at law, because numerous suits between the parties, involving the title of the plaintiff to different portions of the vein underlying defendant's surface, will be necessary; that the defendant has entered upon certain portions of the vein beneath the surface of the Pennsylvania claim, has extracted valuable ores therefrom, and is engaged in prosecuting mining developments for the purpose of removing other valuable ores; that said entry is without right and against the wish of plaintiff; that the defendant threatens to continue to enter upon the vein of plaintiff, and to extract, remove, and convert to its own use valuable ores belonging to plaintiff; that plaintiff does not know and cannot ascertain the value of the ores so taken away; and that, if the defendant be not enjoined, the plaintiff will be compelled to resort to a multiplicity of suits to protect its rights, while in the meantime its estate is being wasted and destroyed. The prayer demands that the defendant be required to set forth the nature of its claims; that it be adjudged that defendant has no right or title to any part of the vein or ore bodies in controversy, that the plaintiff's title be quieted, and that defendant be forever enjoined from removing any ores therefrom or asserting any right or title thereto.

The defendant, in its answer, makes the following denials: That the plaintiff is the owner of the veins, lodes, or ledges having their tops or apices within the premises described,

or is entitled to the possession of them throughout their entire depth; that the top or apex of any veins or lodes lies within the Johnstown lode claim, or that the said tops or apices extend through the length of the claim parallel to the side lines, and pass through the end lines thereof; that the top or apex of any of the veins or ledges described lies within the portion of the Johnstown owned by plaintiff, or passes on its strike through the end lines thereof; that, while the vein claimed by defendant so far departs from the perpendicular on its dip as to extend under the Pennsylvania, it passes through the end lines of the claim or the part thereof owned by the plaintiff; that the plaintiff is the owner of the parts of the vein lying outside of the lines of the Johnstown claim, and within the planes described by plaintiff; that the plaintiff is the owner of any vein within the Pennsylvania claim, whether beneath the plane extending into the earth at an angle of 40° below the horizon from the north side line of said claim, or not; that the plaintiff is the owner of any ore bodies beneath said plane; that any claim of the defendant thereto casts a cloud upon plaintiff's title, or restricts the plaintiff's enjoyment thereof; that the claim of the defendant is without right or title; that the right or title of plaintiff cannot be protected by one or two actions at law, or that numerous actions ought to follow between the plaintiff and the defendant touching different portions of the vein or lode of the plaintiff underlying the Pennsylvania claim; that it has, by underground workings or otherwise, entered upon the lode claimed by plaintiff within the Pennsylvania claim, or at all, and extracted valuable ores therefrom, or that it is now engaged in so doing; that the extraction of any ores from said lode by the defendant is against the wishes of the plaintiff, or that the defendant is continuing or threatens to continue to extract ores therefrom and to convert them to its own use, against the wishes of the plaintiff; that, unless the defendant is restrained and en-

joined from entering upon said vein and removing ores therefrom, it will continue to do so, to the great or any injury of plaintiff; that the plaintiff cannot ascertain the value of the ores which the defendant is extracting or will extract; and that the plaintiff will be compelled to bring a multiplicity of suits against defendant in order to protect its property. After asserting that any claim of the plaintiff to the veins and ore bodies in controversy is without right, and that the plane drawn at an angle of 40° below the horizon from the north side line of the Pennsylvania claim would include numerous veins lying south of the vein claimed by plaintiff, because said vein has a much steeper dip than the plane, the answer proceeds to allege affirmatively that a suit brought by defendant against the plaintiff in the circuit court of the United States to determine the rights of the parties to all ores found beneath the surface of the Pennsylvania claim is still pending and undetermined, that the plaintiff herein has appeared in the action, that said action puts in question the title to all ores or ore bodies described in the complaint herein, and that said United States court has acquired jurisdiction of all matters involved in this controversy. It is further alleged that the plaintiff, by claiming the title to all ores beneath a plane descending into the earth at an angle of 40°, is claiming to a boundary plane different from the dip of the vein, and that by reason thereof there is included in plaintiff's claim numerous veins which cannot possibly have their tops or apices in plaintiff's ground.

In an amendment to this answer the defendant admits that the plaintiff was at the beginning of the action in possession of workings within the Pennsylvania ground below the 400-foot level and above the 900-foot level, and avers that it was also in possession of the small triangle of ground in the northeast corner of the claim, but denies that it had possession of any other part or portion of the claim. It further avers that to the south of and above these workings there were

other veins and ore bodies, all of which were in the possession of the defendant.

To this amendment plaintiff made reply, reiterating its claim of possession, not only of all the ore bodies exposed in its workings, but throughout the entire depth of the vein on its dip.

At the conclusion of the evidence, the plaintiff, by leave of court, made amendments to the complaint by so changing the language therein as to include all veins having their tops or apices within the conveyed portion of the Johnstown claim, and passing through one or both of the end lines of the claim. There was added, also, an allegation that plaintiff had title to and possession of the small triangular piece of ground in the northeast corner of the Pennsylvania, and that the defendant was, at the beginning of the action, engaged in committing trespasses upon the plaintiff's ore and ore bodies beneath the surface of this triangular piece of ground, and beneath the surface of the Snow Bird claim and the portion of the Johnstown claim belonging to defendant, to the south of plaintiff's premises. The prayer was amended so as to demand that the decree quiet title to these portions of the vein, as well as to the portions beneath the part of the Pennsylvania claim belonging to the defendant.

Upon the filing of these amendments, the defendant moved the court for a continuance of the cause, upon the ground that new issues were presented, which it was not prepared to meet. The motion was denied, and the defendant required to answer at once. This it did. The amended answer admits ownership in plaintiff of the small portion of the Pennsylvania claim described. The defendant then, besides denying substantially the amended allegations, avers that much of the work done by the plaintiff in the Pennsylvania claim has been done upon veins having their tops or apices within the boundaries of that claim, or within the Johnstown claim outside of the plaintiff's premises, and that at the be-

ginning of the action the plaintiff had not the possession of any of the veins or workings within the Pennsylvania or Johnstown claims south of the plaintiff's premises, except by a wrongful entry thereon by underground workings, and by occuyping the same against the wishes of the defendant. It is further averred that the defendant is the owner and in possession of the Pennsylvania claim, except the portion described, and of the Johnstown claim outside of and to the south of plaintiff's premises, and claims to own the ores beneath the surface of these claims, and also beneath the Snow Bird claim, so far as they lie within veins having their tops or apices within the portion of the Johnstown owned by it.

To these averments the plaintiff made reply, which contains denials and a reiteration of many of the allegations set forth in the complaint. When the issues were made up, the defendant renewed its motion for a postponement of the case, and offered to file affidavits showing surprise at the court's action. The motion was again denied. Thereupon, after argument, the cause was submitted. Findings were made in favor of the plaintiff, and judgment entered thereon, granting the relief demanded. From the judgment and an order denying a new trial, the defendant has appealed.

To elucidate the pleadings and illustrate the questions at issue, reference may be had to the subjoined diagrams; the one representing the contention of the plaintiff, and the other that of defendant:

The Pennsylvania claim was located on June 18, 1877, and patent issued to the locators on April 9, 1886. The Rarus was located on October 2, 1878, and a patent issued on June 5, 1884. The Johnstown was located on January 4, 1879, and patent issued on November 15, 1884. The portion of the Johnstown indicated by the letters A, B, C, D, E, F, which will hereafter be referred to as the "conveyed portion," belongs to the plaintiff. The plaintiff is also

the owner of the Rarus. For some reason not explained in this record, the Rarus patent, though that claim is older than the Johnstown, excluded the part in conflict with the Johns-

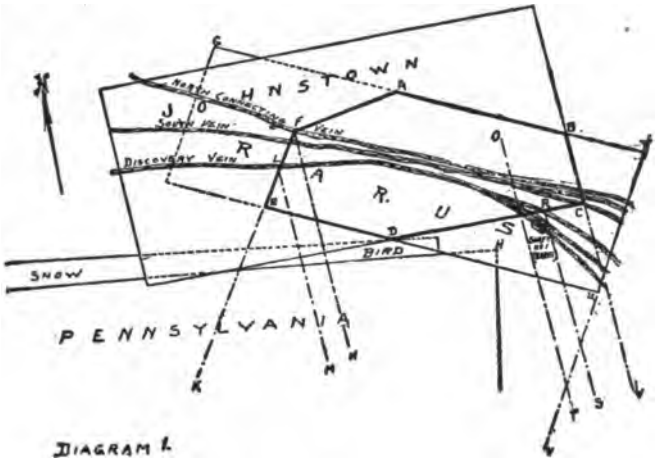

DIAGRAM 1.

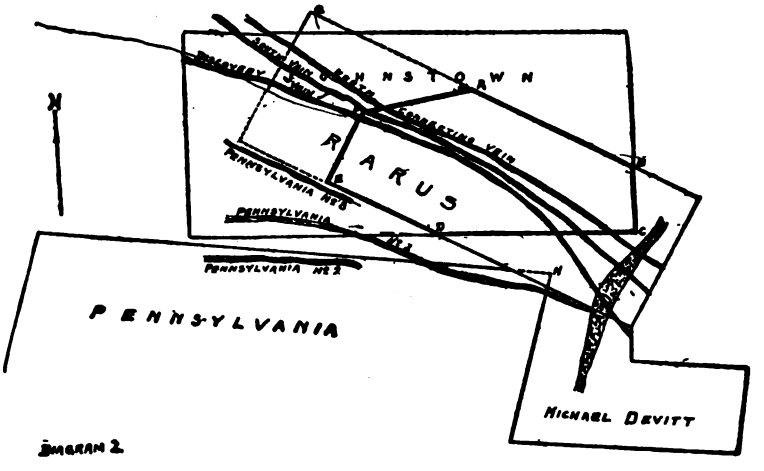

DIAGRAM 2.

town. The patentees of the latter therefore acquired title to the part in conflict. The portion in conflict between the Rarus and the Pennsylvania belongs to the plaintiff. The de-

fendant is the owner of the Pennsylvania, except the portion in conflict, and also of the Johnstown, except the conveyed portion. The Pennsylvania and Johnstown were located by the same persons, and the plaintiff and the defendant obtained title from these original locators by mesne conveyances. The triangular portion of the Snow Bird between the Johnstown and the Pennsylvania is not owned by either of the parties. The controversy involves the situation of the apex of the veins in the conveyed portion, and their continuity and identity to the ore bodies found in the workings down to the 900-foot level beneath the surface of the Snow Bird, the northern portion of the Pennsylvania, and the Johnstown south of the conveyed portion. The plaintiff claims that the veins indicated upon diagram 1 dip to the south at an angle of about 70° from the horizon, thus departing into the territory belonging to the defendant; this situation being made apparent from the identity and continuity of the veins from the apex down to the 900-foot level by numerous workings along the vein upon its dip and strike. It claims that it is entitled to these veins on their dip and along the strike between perpendicular planes descending into the earth, one parallel with the east end line of the Johnstown at a point where the veins pass through the south side line of the Johnstown, and the other through the line E, F, extended in its own direction until it meets the west end line of the Johnstown extended, and thence in the direction of that line. The defendant's contention is that two of these veins pass on their strike through the north and south side lines of the Johnstown, that plaintiff has no extralateral rights upon them in the direction of the Pennsylvania claim, and that the third or discovery vein has not been sufficiently developed to indicate what plaintiff's rights are. It also claims that the ore bodies in controversy are found in veins having their tops or apices in the Pennsylvania, and the portion of the Johnstown outside of the conveyed portion, and hence that

the plaintiff has no right to them. There is a further contention that, though the identity and continuity of the veins having their tops or apices in the conveyed portion be established as claimed by plaintiff, they unite on their dip with other veins having their tops or apices in the Pennsylvania claim, and belong to the defendant below the point of union, by virtue of the prior location of this claim. Still another contention is made by defendant, that there is a fault extending through the country covered by the claims in this controversy; that it is indicated in the formation of the country by two fault fissures, substantially parallel with each other and with the east end line of the Rarus, as shown on diagram 2 by the word "Fault" over the dark shading, and descending into the earth at an angle of about 50° to the northwest; that this fault, occasioned by geological disturbances in the crust of the earth, was attended by such a movement of the portion between the fissure planes as to cut off the continuity and identity of the veins so that they cannot be followed from the west through the fault; and that the plaintiff's extralateral rights upon the veins do not extend to the ore bodies in controversy, because they are cut off on their dip by the plane of the fault toward the northwest. This contention will be understood by reference to the diagrams accompanying the opinion of this court in *Anaconda M. Co.* v. *Heinze,* 27 Mont. 161, 69 Pac. 909. In those diagrams the position of these fault planes is shown by the heavy lines at the 900 and 1,000-foot levels under the Snow Bird claim on diagram 1, and the vein matter ending under the east fault fissure is shown on diagram 2. The situation contended for by the defendant in this case will be readily understood by supposing diagram 2 reversed, and the vein matter on the west cut off by the fissure on the opposite side of the fault from that shown.

These contentions were made in the evidence. The pleadings do not show upon what the defendant bases its adverse

claim, except in the averment that the ore bodies in controversy have their apices in ground belonging to the defendant, and therefore belonging to it by virtue of its ownership of the surface under which they are found. That the plaintiff was at the beginning of the action in possession of the conveyed portion of the Johnstown is admitted. It is also practically admitted that it was in the possession of the workings and ore bodies in controversy, but it is averred that such possession was wrongful.

1. This action was brought on May 2, 1898. It was dismissed as to the first cause of action on April 15, 1899. At that time a motion was made by plaintiff asking that a day be set for the hearing. On April 22d the hearing was fixed for May 22d. On the latter date, upon application of the defendant, the hearing was postponed until July 24th. On July 24th an application for postponement was again made by the defendant, which was granted, and the hearing was fixed for August 11th. On July 24th, when the cause was set for trial, the defendant was, upon motion, permitted to amend its answer. On August 11th it submitted a motion asking that the cause be dismissed—First, because the plaintiff had dismissed the legal cause of action instituted to try the question of title and other legal issues involved, and the dismissal of that cause of action should operate as an abatement of the equitable cause of action, the latter being merely ancillary to the former; and, second, because the issues presented in the equitable cause of action are legal issues, and cannot be tried in an equitable action. Four other grounds were embodied in the motion, but they are substantially repetitions of the two stated. This motion, we think, was properly denied.

The first or legal cause of action stated was for damages for ores already extracted and converted by the defendant. This was wholly independent of the cause of action stated in the second count. It contained only allegations necessary to

authorize a recovery for a past trespass, and had the plaintiff gone to trial thereon, and sustained these allegations by a preponderance of the evidence, it would have been entitled to a verdict and judgment for a substantial sum. The second cause of action was designed to obtain a different character of relief, namely, a determination of the adverse claim of the defendant, and an injunction to restrain it from attempting to assert its adverse claim again. It alleges that the plaintiff is the owner, entitled to the possession and in the actual possession of the property,—not only of the surface of the claim and the apex of the vein, but also of the vein on its dip to its farthest depth; that the defendant makes some claim thereto adverse to the plaintiff's right; and that said claim is without foundation. It concludes with a prayer that the defendant be compelled to exhibit its claim, that the court declare it without foundation, and that the defendant be enjoined from ever again asserting it. Section 1310 of the Code of Civil Procedure declares that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." As a general statement, it is sufficient, under this section, that the plaintiff has an interest in the real estate in controversy, and that the defendant asserts a claim adverse to him. It does not in terms provide for, nor does it contemplate, one or more actions at law by plaintiff to establish his title before he may require the defendant to set forth the nature of his adverse claim, and have it determined in any form of action appropriate to the case. *Castro* v. *Barry,* 79 Cal. 443, 21 Pac. 946; *Curtis* v. *Sutter,* 15 Cal. 262; *Stark* v. *Starr,* 73 U. S. 402, 18 L. Ed. 925. If the plaintiff for any reason refrains from asserting his claim for damages for past trespasses, or abandons it after bringing suit to establish it, the defendant has no cause of complaint. Under Code Civ. Proc. § 460, there is but one form of civil action for the enforcement or protection of pri-

vate rights or the redress or prevention of private wrongs, and, upon a cause of action or defense stated, the court will proceed to try the cause as one at law or in equity, upon the issues presented, and grant such relief as the circumstances demand. The fact that in this case the plaintiff concluded to abandon its cause of action for damages furnished no reason why it should be refused such relief as it could demand under the count joined therewith to settle the adverse claim.

This conclusion renders unnecessary a consideration of plaintiff's argument that the defendant waived its right to interpose the motion to dismiss the action by theretofore moving for leave to amend its answer and for the several postponements of the hearing.

2. On the day set for the trial the defendant asked that all the issues in the case as to the identity and continuity of the veins in controversy, and particularly the question of title thereto, be submitted to a jury for a general verdict as in an action at law. This request was denied. Thereupon request was made that the court frame issues of fact involving the same questions, and submit them to the jury for special findings. This request was also denied. It is now urged that the defendant was entitled to a trial by jury as a matter of right, under the clause of the state constitution (article 3, § 23), declaring that "the right of trial by jury shall be secured to all and remain inviolate," and that the court erred in refusing it. There is thus presented the important question whether, in the class of cases to which this belongs, a trial by jury may be demanded as a matter of right. A correct solution of it requires an investigation of the conditions existing at the time the territorial government was merged in that of the state, for unless by express terms the constitution, by the language employed therein, manifests an intention by the convention to extend the right guaranteed under this broad declaration to cases wherein it could not theretofore have been demanded as a matter of right, it must be understood as se-

curing such right in this regard only as existed at the time of its adoption. *State* v. *Kennie,* 24 Mont. 45, 60 Pac. 589, and cases cited; *Finch* v. *Kent,* 24 Mont. 268, 61 Pac. 653. This rule is elementary. Now, there is nothing in the constitution manifesting an intention to extend the right to a jury trial to cases wherein it did not theretofore exist. We must therefore assume that, if under the territorial government a jury could have been demanded in this case as a matter of right, it may be demanded now; otherwise it may not.

At the first session of the territorial legislature, in 1864, the following provision was enacted:

"An action may be brought by any person in possession, by himself or his tenant of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest." Section 233, p. 92, Acts 1864-65.

It was adopted from the statute of California of 1851. Upon the adoption of the Code of California in 1872, the section was modified so as to authorize suit whether the plaintiff is in possession or not. The section as enacted by the Montana legislature was preserved in the various compilations of the Code until the formation of the state government (Cod. St. 1871-2, p. 94, Sec. 303; Rev. St. 1879, p. 110, § 354; Comp. St. 1887, div. 1, p. 160, § 366), when it was continued in force by the constitution (schedule 1). In the Code of 1895, section 1310, *supra,* was enacted, and the old section repealed. The purpose of the original act was to enlarge the power of courts, and to enable them to entertain actions to quiet title to real estate in the possession of the plaintiff without the necessity of first having the title established by one or more actions at law. Said Field, C. J., after quoting the statute, in *Curtis* v. *Sutter,* 15 Cal. 260: "This statute enlarges the class of cases in which equitable relief could formerly be sought in quieting title. It authorizes the interposition of equity in

cases where previously bills of peace would not lie." Then after discussing the nature of bills of peace under the old equity practice, and the circumstances under which they would lie, he proceeded: "Under the statute of this state, it is unnecessary for the plaintiff to delay seeking the equitable interposition of the court until he has been disturbed in his possession by the institution of a suit against him, and until judgment in such suit has passed in his favor. It is sufficient if, whilst in the possession of the property, a party out of possession claim an estate or interest adverse to him. He can immediately, upon knowledge of the assertion of such claim, require the nature and character of the adverse estate or interests to be produced, exposed, and judicially determined, and the question of title be thus forever quieted. It does not follow from the fact that the suit is brought in equity that the determination of questions purely of a legal character in relation to the title will necessarily be withdrawn from the ordinary cognizance of a court of law. The court sitting in equity may direct, whenever in its judgment it may become proper, an issue to be framed upon the pleadings and submitted to the jury. Upon the verdict of the jury, if a new trial be not granted, the court will then act, by either dismissing the bill, or by adjudging the adverse estate or interest claimed to be invalid and of no effect, and awarding a perpetual injunction against its assertion to the property in question." Mr. Pomeroy, in discussing the fundamental principles of equity, says: "The exclusive jurisdiction includes, secondly, all civil cases in which the remedy to be granted—and, of course, the remedial right—is purely equitable, or one which is recognized and administered by courts of equity, and not by courts of law. In the cases of this class, the primary right which is maintained, redressed, or enforced is sometimes equitable and is sometimes legal; but the jurisdiction depends, not upon the nature of these rights, estates, or interests, but wholly upon the nature of the remedies." Then, after giving various illus-

trations of cases in which courts of equity have exclusive jurisdiction, he proceeds: "It is proper to remark here that the statutory legislation of many states has increased the number of cases in which purely equitable remedies are granted for the purpose of maintaining, enforcing, or defending primary rights, estates, and interests which are legal in their nature, and has thus enlarged this department of the original exclusive jurisdiction of equity. As examples, merely, I mention the statutory suit to quiet title and determine the legal estate by the holder of the fee in possession or not in possession, against an adverse claimant or claimants relying, perhaps, upon another legal title. * * *" Pom. Eq. Jur. § 138. It is thus clear that the purpose of the statute was to confer upon courts of equity the power to entertain the action, which theretofore would not lie, and to enable them to ascertain and quiet the title without the intervention of a court at law, for, as it is pointed out by Chief Justice Field in *Curtis* v. *Sutter, supra,* the action at law would not be conclusive as to the title, and, the purpose of the action being to prevent disturbance of the possession of the plaintiff and to protect him from future litigation, a court of equity could finally settle the adverse claim, and quiet the title forever. Such has also been the holding by the California court, under the revised section of the statute, where the action has been brought by a person in possession. *Brandt* v. *Wheaton,* 52 Cal. 430; *Polack* v. *Gurnee,* 66 Cal. 266, 5 Pac. 229; *Benson* v. *Shotwell,* 87 Cal. 49, 25 Pac. 249; *Reynolds* v. *Lincoln,* 71 Cal. 183, 9 Pac. 176, 12 Pac. 449. "The statutory action to determine an adverse claim is an improvement on the old bill of peace. The statute enlarges the class of cases in which equitable relief could formerly be sought in the quieting of title. It is not necessary, as formerly, that the plaintiff should first establish his right at law." *Castro* v. *Barry,* 79 Cal. 446, 21 Pac. 946. Under the revised form of the statute, different situations may exist as to possession,

each calling for a different remedy. The plaintiff may be in possession. The appropriate remedy is a suit in equity to quiet title. If the defendant is in possession, the appropriate remedy would seem to be an action of ejectment at law to try the question of title and right of possession, and a judgment thus obtained against the defendant would be conclusive of the plaintiff's title and right to the possession. It is held, however, that a suit in equity will also lie in this case (*Foree* v. *Stubbs* [Neb.] 59 N. W. 798; *Frost* v. *Spitley,* 121 U. S. 552, 7 Sup. Ct. 1129), provided the plaintiff has a clear legal title. If the property is not occupied, then the suit is one in equity, for there is no form of legal action which could, under such circumstances, be invoked. *Bigelow* v. *Chatterton,* 51 Fed. 614. If a third party is in possession, the defendant claiming adversely may be joined as defendant with the party in possession. Code Civ. Proc. § 582. In that case the appropriate action would assume the aspect of an action at law in ejectment, which might under some circumstances be joined with a count for equitable relief.

The supreme court of California has not always been consistent with itself in determining whether the particular action was one in equity or at law. The result of its decisions seems to be that whenever the action is in the nature of ejectment, either upon the allegations contained in the complaint, or the nature of the relief demanded thereon, or when the defendant seeks possession by a counterclaim of that nature, the action is one at law, and either party is entitled to have the legal issues thus raised tried by a jury; otherwise the suit is one of equitable cognizance, and a jury may not be demanded as a matter of strict constitutional right. The following cases, in addition to those already cited, will be sufficient to illustrate this statement: *Hyde* v. *Redding,* 74 Cal. 493, 16 Pac. 380; *Donahue* v. *Meister,* 88 Cal. 121, 25 Pac. 1096, *Newman* v. *Duane,* 89 Cal. 597, 27 Pac. 66; *Angus* v. *Craven,* 132 Cal. 691, 64 Pac. 1091.

It may be stated, as a general proposition, that it is not an objection to the jurisdiction of a court in equity that legal questions are presented for consideration which might also arise in a court of law. If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the questions involved. *Holland* v. *Challen,* 110 U. S. 15, 3 Sup. Ct. 495; *Smith* v. *Bank,* 89 Fed. 832. In *Holland* v. *Challen, supra,* in construing a similar statute, the supreme court of the United States said: "The statute of Nebraska enlarges the class of cases in which relief was formerly afforded by a court of equity in quieting the title to real property. It authorizes the institution of legal proceedings not merely in cases where a bill of peace would lie (that is, to establish the title of the plaintiff against numerous parties insisting upon the same right, or to obtain repose against repeated litigation of an unsuccessful claim by the same party), but also to prevent future litigation respecting the property, by removing existing causes of controversy as to its title, and so embraces cases where a bill *quia timet* to remove a cloud upon the title would lie." In order to maintain a bill of peace under the old practice, it was necessary to allege and show that the legal title had been successfully maintained in one or more actions at law. The ultimate relief sought was protection from future litigation and interference with the plaintiff's possession. The actions at law were not conclusive, and the courts of equity proceeded to ascertain the title, and thereupon, when ascertained, to grant the ultimate relief demanded. If it took jurisdiction for any purpose, it took jurisdiction for all purposes, and determined all questions involved, whether legal or equitable, and that, too, without the intervention of a jury, except at the discretion of the chancellor.

We have made the foregoing observations in connection with the authorities cited for the reason that they are cited by counsel and discussed in their briefs, counsel on

each side claiming that they support their theory of the law. It would serve no useful purpose to refer to the great number of other cases cited by counsel. We think the question at issue must be decided against the contention of the defendant upon the decisions of this court prior to the adoption of the constitution.

The early case of *Gallagher* v. *Basey*, 1 Mont. 457, was a suit for perpetual injunction to restrain the diversion of water. The action was sustained, though it did not appear that the legal title had ever been tried in an action at law. It was also held that the defendants were not entitled to a trial by jury. The court proceeded upon the theory that, its equity jurisdiction having been invoked for relief by injunction, it could determine the question of title involved in the first instance, though it was directly put in issue, and though it is the rule that a court of equity does not usually interfere in such cases until the title has been established by an action for damages. This case was affirmed by the supreme court of the United States; that court holding that, though the statute of the territory regulating civil proceedings declared "that an issue of fact shall be tried by a jury unless a jury trial be waived," a court sitting as a court of equity was not bound by the findings of a jury upon the issues submitted at the trial. *Basey* v. *Gallagher*, 87 U. S. 670.

Fabian v. *Collins*, 3 Mont. 215, was another case of the same character, and yet the territorial court expressly held that a trial by jury could not be demanded as a matter of right; citing with approval *Gallagher* v. *Basey, supra*, and *Kleinschmidt* v. *Dunphy*, 1 Mont. 118.

The case of *Wolverton* v. *Nichols*, 5 Mont. 89. 2. Pac. 308, was an action to determine an adverse claim to a mine, in pursuance of the provisions of section 2326 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1430). The supreme court held that the action was one in equity to quiet title under section 354 of the Revised Stat-

utes, and should be so treated. It was also held that in order to maintain the action the plaintiff must allege and prove his possession; otherwise he should proceed in ejectment.

Milligan v. *Savery,* 6 Mont. 129, 9 Pac. 894, was an action of the same character; and although the case went off upon a motion for a nonsuit, as did also *Wolverton* v. *Nichols, supra,* the latter case was cited, and the conclusions therein announced were approved.

The case of *Mantle* v. *Noyes,* 5 Mont. 274, 5 Pac. 856, was an action under the statute to determine conflicting claims to real estate between the patentees of a placer mine and the locators of a quartz lode. The fundamental question at issue, as in the other cases cited, was the legal title to the property in controversy; and yet it was expressly decided that the issue of fact presented was to be finally determined by the court, and that a jury could not, as a matter of right, be demanded by either of the parties; and the case of *Gallagher* v. *Basey, supra,* was considered at some length, and expressly approved.

Garfield M. Co. v. *Hammer,* 6 Mont. 53, 8 Pac. 153, was another case involving adverse claims to mining ground under the statute. The question of the right of trial by jury does not seem to have been agitated, but in speaking of the nature of the action the court used this language: "Now, although the courts of this territory, in determining the title to mining claims, where there is a dispute in relation thereto in the land office, have adopted the forms of action by which title to land is tried, which may be either by the action of ejectment or to quiet title, yet the real question to be determined is, who is entitled to the patent from the United States government to the mining claim in controversy, or, in other words, who has become the purchaser of the mining claim, and devested the title of the government thereto, by complying with the requirements of the law of congress relative to acquiring title to mineral lands?"

In all these cases the main issue involved was the question of legal title, and yet the court proceeded as in equity, and not at law, and determined it without the aid of a jury, or, if a jury was called, its findings were regarded as advisory only.

This was the condition of the law on this subject at the time the constitution was devised by the convention and adopted by the people. Since that time all of these cases have been repeatedly cited and approved. *Sklower* v. *Abbott,* 19 Mont. 228, 47 Pac. 901; *Murray* v. *Polglase,* 23 Mont. 413, 59 Pac. 439. Is it not reasonable to presume that the members of the convention used the language referred to with knowledge of these decisions, and that it was deemed wise not to overturn them? Either this presumption must prevail, or this court must proceed to overturn them upon the presumption that the members of the convention did not inform themselves as to the condition of the law as declared in these cases, and intended something beyond what the language used by them in the constitution expresses. The subject is one of no little difficulty. But for these cases, we should hold that the right of trial by jury extends to all cases wherein the legal title or right of possession is at issue.

The revised form of the statute, so far as concerns cases of the class to which the present one belongs, embodies the same principle as the original section. The cases decided under the latter are entirely applicable to those of the same kind arising under the former.

The plaintiff alleged title and possession in itself. The court found the allegation true. Indeed, title to the surface of the conveyed portion and of the Rarus and to the apex of the veins is admitted, as is also the possession of the ore bodies in controversy. An effort was made to show that the possession of the latter is wrongful, and therefore does not rest upon the legal title, by evidence that two of the veins are so situated with reference to the end lines of the Johnstown claim that extralateral rights in the direction of defendant's

ground cannot be asserted, and that development of the third is not sufficient to demonstrate its continuity and identity from the apex to the point in dispute. An attempt was also made to show that, even if plaintiff has extralateral rights in the direction of defendant's premises, defendant is entitled to all of the veins below a certain point, by reason of a union of them with certain veins having their tops or apices within the Pennsylvania claim; it being older in the date of its location than the Johnstown claim. Of course, if the theory of the defendant had prevailed, the action should have been dismissed. As it did not, the result must necessarily follow that the plaintiff has the title and lawful possession of the veins on the dip and strike, and is entitled to the relief demanded, notwithstanding the *prima facie* presumption in favor of defendant's title to everything beneath its surface. This presumption was overturned and destroyed as soon as the identity and continuity of the plaintiff's veins from their apices to the point in controversy was established; it being made to appear, also, that plaintiff had a right to follow them on their dip. These conflicting rights, dependent upon the physical and geological facts found upon an inspection of the surface and underground workings, are similar in their nature to those tried and determined in actions to determine adverse claims to surface rights, and are governed by the same principles.

Our conclusion, therefore, is that the court committed no error in denying a trial by jury.

3. The point is made that the evidence is not sufficient to sustain the findings as to the situation of the veins, and their continuity and identity on their descent into the earth. The evidence is conflicting upon all the issues involved. The findings of the trial court thereon are conclusive upon this court, and will not be disturbed.

4. Many errors are assigned upon the admission and exclusion of evidence. We have given patient attention to them all. We do not think any error complained of in this regard

of sufficient importance to warrant a reversal of the judgment or order. It would be impossible for a court to try such a cause, consuming, as this did, 55 days in hearing evidence covering nearly 6,000 printed pages, without allowing some errors and irregularities to intervene. None of the rulings complained of were prejudicial. The evidence which was excluded was either subsequently admitted, or was of such character that it could not have affected the result. In every instance that which was admitted was competent and material for the purpose for which it was offered. We shall notice specially but one of the numerous rulings complained of. The defendant offered in evidence the notice of location of the Pennsylvania claim, in connection with the mesne conveyances before patent from the original locators to the defendant, all of which were excluded. This evidence was offered in support of the defendant's theory that this claim was located before the Johnstown or the Rarus claims, and that there are veins having their apices within the Pennsylvania claim which in their descent into the earth unite with those having their apices in the Rarus and Johnstown claims; thus giving defendant title to the whole vein below the point of union. The evidence was all excluded on the ground that the notice was not verified as required by the statute of the territory of Montana in force at the time the location was made. Counsel for the defendant contend that this ruling was erroneous, for the reason that it excluded all evidence as to the date to which the patent relates, and also for the reason that the statute requiring the notice to be verified was in contravention of the organic law of the territory, prohibiting legislation by the territorial government "interfering with the primary disposal of the soil." Conceding the ruling to have been erroneous for either or both reasons, yet no prejudice was done, for the reason that the court found from the evidence that no such veins existed as claimed by defendant. The evidence became material only in connection with other

evidence tending to establish the existence of such veins having their apices in defendant's ground as could unite with those having their apices in plaintiff's ground. If none such existed, the relative dates of the location of the claims in controversy was not a material inquiry; it being apparent that defendant had introduced all the evidence it had upon this point, or had an opportunity to do so.

5. Defendant argues that the court erred in refusing a postponement of the trial because of the amendments made to the complaint at the close of the evidence, and because the case was not then reopened for the introduction of other evidence by defendant in support of its various contentions. Upon the theory that the amendments presented no issues other than those tried in the evidence, it was in the discretion of the court to permit the pleadings to be amended as it did, and to deny the motion for a postponement. *Palmer* v. *McMasters,* 6 Mont. 169, 9 Pac. 898; *Ramsey* v. *Cattle Co.* 6 Mont. 498, 13 Pac. 247; *Hartley* v. *Preston,* 2 Mont. 415. This discretion extends to the allowance of amendments, even after verdict and judgment, to make the pleadings correspond with the proof. *Wormall* v. *Reins,* 1 Mont. 627; *Randall* v. *Greenhood,* 3 Mont. 506. We have in the statement set forth the pleadings in full, together with the contentions made in the evidence. It is clear from an inspection of them that no new issues were presented by the amendments. The situation of the veins in the ground of both parties, both with reference to the boundary lines of all the claims, including the Rarus and the Snow Bird, and their dip and strike, with the geological formations and physical conditions found beneath the surface, were fully agitated by the parties. Many expert witnesses were examined, who had spent much time in studying the workings in all of these claims in order that they might be able to testify intelligently. It does not appear from affidavits filed at the time the ruling was made, or in connection with the motion for a new trial, that the defendant had other evi-

dence which it could have presented, had the ruling been different. Under these circumstances, we think the amendments were properly allowed, and that there was no error in denying the postponement asked, in order that additional evidence might be furnished.

6. The court, having found that the portions of the vein in controversy belong to the plaintiff by virtue of its extralateral rights, fixed in the decree the perpendicular planes limiting these rights along the strike. Toward the east the limit was fixed at a plane passing through the point where the veins depart from the conveyed portion through the south side line, 294 feet west of the east end line of the Johnstown, and parallel with it. Toward the west the limit was fixed at a plane passing in the direction of the line E, F, until it meets the plane of the west end line of the Johnstown, and thence in the direction of that line extended. The theory upon which the latter plane was thus fixed was that the owners of the Johnstown, in fixing the end lines of the surface boundaries of the conveyed portion as they did, thus indicated their intention to convey to the plaintiff all the veins on their dip in the same direction, and that, having subsequently conveyed to the defendant the remainder of the surface of the claim, it obtained only such portion of the veins as was not previously conveyed. The defendant contends that the deeds under which the plaintiff obtained title do not convey any extralateral rights at all, or, if they do, that such rights should be limited toward the west by planes parallel with the end lines of the Johnstown, passing through the points where the different veins pass through the end line E, F, and extended indefinitely to the south in the direction of the dotted lines L, M, and F, N.

The deeds in question are one executed by the patentees to the plaintiff's grantors on March 7, 1883, and the deed to the plaintiff from his immediate grantor on January 13, 1897. The former grants all the right, title, and interest of the grantors

"To that certain portion, claim, and mining right, title, and property, on that certain ledge, vein, lode, or deposit of quartz and other rock in place, containing precious metals of gold, silver, and other metals, and situated in the Summit Valley mining district, county of Silver Bow, and territory of Montana, and described as follows, to wit:"

Then follows a description by metes and bounds of the conveyed portion, after which the deeds continue:

"All right, title, and interest that is now possessed, together with any that may hereafter accrue, through application No. 1,265 made to the U. S. government by the grantors herein for a patent for lot No. 173, together with all the dips, spurs, and angles, and also all the metals, ores, gold, silver, and metal bearing quartz, rock, and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had and enjoyed."

The latter grants to the plaintiff all the right, title, and interest and estate of the grantor in

"All that portion of the Johnstown quartz lode mining claim, designated as lot number one hundred seventy-three (173) in township three (3) north, range seven (7) west, and which is particularly bounded and described as follows, to wit."

Then follows a description of the conveyed portion by metes and bounds, referred to in the former deed. All reference to metals, ores, quartz-bearing rock, etc., is omitted.

In determining the effect of these conveyances, regard must be had not only to the terms employed in them and the surrounding circumstances, but also to the character of the property granted. An ordinary conveyance of agricultural land or of town lots describes the subject of the grant merely by metes and bounds as so much of the earth's surface. Yet, without specific mention, the grant includes the right of support from lands adjacent thereto, as well as everything above and beneath the surface, unless, by apposite words contained in it, some reservation is made. These rights, conveyed with-

out specific description, are not mere incidents, but are substantive parts of that which is described, to the extent that without them the subject of the grant is not susceptible of its appropriate use and enjoyment; in other words, the rights conveyed extend far beyond the specific words of description contained in the deed. Now, a patent from the United States to a quartz claim conveys everything which is granted by an ordinary conveyance between private parties, and in many cases much more. If the conditions of the law have been observed, it conveys, in addition to what is found beneath the surface described therein, all the veins, to their utmost depths, the tops or apices of which are found within the surface granted, though they so far depart from the perpendicular in their descent into the earth as to extend outside of the vertical side lines of such surface. As, in a conveyance of agricultural lands or town lots, everything is presumed to be granted which is necessary to the enjoyment of the species of property, without specific description, so by a deed to a quartz claim, or a definite portion thereof, as such, everything necessary to the proper and full enjoyment of that species of property will be presumed to have been conveyed, unless there be employed specific words showing the intention of the grantor to make some reservation. Extralateral rights are not a mere incident or appurtenance, but a substantial part of the property itself which is the subject of the grant. They are not susceptible of a more definite description than that contained in the statute, which the patent follows, because the conditions beneath the surface cannot be ascertained prior to the issuance of patent; but we apprehend that they would pass from the government to the grantee under a patent to a quartz claim, as such, by virtue of the provisions of the statute, even though the patent contained no express reference to them whatever. In the first deed mentioned, it was evidently the intention of the grantors to grant no less a right than they would themselves obtain under the patent which they had

applied for, because the language expressly says so. They were conveying a portion of the Johnstown claim, including a definite, fixed portion of the apex of the vein along its strike. They must therefore be conclusively presumed, in the absence of words of express reservation, to have intended to convey whatever other substantial property rights were attached to such portion of the apex. The immediate grantor of the plaintiff, therefore obtained all the rights which he would have obtained by a patent directly to himself. The second deed omits any reference to the veins, or the dips, spurs, and angles thereof, but it is apparent therefrom that the parties were dealing with the property as quartz mining property,—that is, as a definite portion of the "Johnstown quartz lode mining claim;" and, from what has already been said, the presumption must obtain that the grantor intended to part with all his right, title, interest, and estate therein, of whatever character and description. Hence the inevitable conclusion that the plaintiff is vested with the rights obtained by the patentees of the Johnstown claim, and has such rights upon the veins, extralaterally, as belong to the apex embraced within the end lines of the conveyed portion.

The fact that the end lines of the conveyed portion were fixed as they were does not, standing alone, justify the conclusion that the grantors of the plaintiff intended thereby to limit or control in any way the extralateral rights as between the grantees of the different portions of the claim.

Plaintiff cites in support of the decree the case of *Boston & M. Consol. Copper & Silver Min. Co.* v. *Montana Ore Purchasing Co.* (C. C.) 89 Fed. 529. In that case the deed of March 7, 1883, was considered by Judge De Haven, and the conclusion reached by him is in accord with the plaintiff's contention. We do not approve the conclusion reached by Judge De Haven. It is founded mainly upon the case of *Stinchfield* v. *Gillis,* 107 Cal. 86, 40 Pac. 98. In that case it is said, in part, that "if the proprietor of a tract of mining

ground, which has been derived through several locations, should dispose of the same in parcels, irrespective of the lines of such locations, the rights of his grantees would be measured by the terms of their deeds." The question in the case before us does not seem to have been definitely presented for decision by the facts, and what was said therein was apparently *obiter.*

In *Richmond Min. Co.* v. *Eureka Min. Co.* 103 U. S. 839, also cited by Judge De Haven, the point, though adverted to, was not decided; the facts showing that the plane of the division line agreed upon between the owners of the adjacent mines was understood, at the time the agreement was made, to extend downward toward the center of the earth. This court commented somewhat upon the decision of Judge De Haven in the *Lexington Case,* 23 Mont. 177, 58 Pac. 111, and expressed the opinion that it is not sustained by the cases cited. We concede the proposition that the parties may, by express or implied agreement, fix such boundaries for themselves as they choose, and, further, that conveyances of patented mining property by private parties are not controlled by any provision of the United States mining laws. We think, nevertheless, that in the absence of some express agreement, or one strongly implied from the circumstances, surface boundary lines should not be held controlling.

There is nothing in this record to indicate that, at the time the first deed was made, either of the parties knew the direction of the dip of the veins; nor is there any presumption that they had such knowledge. If it be true that they did not, what intention could they have entertained with reference to it? If the dip had subsequently been found to be to the north, then, according to plaintiff's view, its rights would have been of little value, because they would have been cut off entirely by the line E, F, extended toward the north a short distance beyond the north line of the Johnstown. The possibilities of the situation will be realized if we suppose all the veins to pass through the line F, A.

In the absence of any agreement, express or implied, we think the character of the property should control, and that only such extralateral rights are conveyed as appertain to the portion of the apex embraced within the boundaries of the conveyed portion, bounded by planes parallel with the end lines of the claim as patented. This theory seems to us to be entirely just, and at the same time to avoid the result that would follow from the view contended for by the plaintiff; that is, that the extralateral rights conveyed are left to depend entirely upon the subsequent ascertainment of the direction of the dip.

A suggestion was made during argument that the west end line of the conveyed portion was fixed parallel with the east end line of the Rarus in a compromise arrangement in the settlement of the conflict between the Rarus and the Johnstown, and for this reason the decree is correct in fixing the west end line of the conveyed portion as the proper direction of plaintiff's extralateral rights. There is nothing in the record to support the conclusion that such a compromise was ever made, except the fact that the west end line of the conveyed portion is apparently parallel with the east end line of the Rarus. Even if it were true, however, that such a compromise was made, the result would be that both end lines limiting the extralateral rights would take their direction from the east end line of the Rarus, and not from that of the Johnstown.

In our opinion, the decree should be modified so as to fix the west end planes in the direction of the line L, M, at the points where the different veins pass through the line E, F; the plaintiff conceding that this is proper, if, upon a construction of the deeds, this court concludes that the trial court erred in fixing the west end plane in the direction of line E, F.

We do not understand that the court below undertook to adjudge any rights as between the plaintiff and the owners of

the ground to the east of the Pennsylvania claim. The decree has not, nor could it have, anything to do with conflicting rights beneath the Michael Devitt claim, because they are not within the issues in this case. The line fixed as to the direction of the boundary plane to the east was intended merely to give the direction of plaintiff's rights beneath the surface covered by the Pennsylvania claim, and nothing more.

7. In the judgment entered by the lower court, the costs of the action were awarded to the plaintiff. In the bill or memorandum filed by plaintiff under the requirements of section 1867 of the Code of Civil Procedure, there were contained items, claimed as necessary disbursements, amounting in the aggregate to $324,134.68. The defendant moved the court, under the provisions of that section, to tax the bill; objecting to many of the items claimed as illegal. After a hearing the court made an order disallowing a portion of the bill, and directing judgment for the balance, amounting to $265,015.58. Complaint is made that four of the items so charged, to wit, for surveys done in preparation for trial, $1,166.66; necessary expenses for stenographer and copies, $1,050.80; necessary models used, $3,424.41; and for development work done in preparation for trial, and for mining supplies, $258,373.01,—were not taxable as costs, and should have been disallowed. We think this contention is just. Costs, as costs, were not recoverable at the common law. *Hibbard* v. *Tomlinson,* 2 Mont. 220; *Orr* v. *Haskell, Id.* 350. Under the rule which has always prevailed in this jurisdiction, no costs can be allowed either party, except such as are provided for by statute. Under this rule, we must look to the statute in order to determine whether the items in question are chargeable.

Section 1866 of the Code of Civil Procedure declares: "A party to whom costs are awarded in an action is entitled to include in his bill of costs, his necessary disbursements as follows: The legal fees of witness, including mileage, of

referees and other officers; the expenses of taking depositions; the legal fees for publication when publication is directed; the legal fees paid for filing and recording papers and certified copies thereof necessarily used in the action or on the trial; the legal fees paid stenographers for per diem or for copies; the reasonable expenses of printing papers for a hearing when required by a rule of court; the reasonable expenses of making transcript for the supreme court; the reasonable expenses for making a map or maps if required and necessary to be used on trial or hearing; and such other reasonable and necessary expenses as are taxable according to the course and practice of the court, or by express provision of law." Such items as those charged for models, for surveys, and for development work done in preparation for trial are not specifically mentioned among those enumerated in this section. They are therefore not taxable, unless they fall within the purview of the last clause, allowing "such other reasonable and necessary expenses as are taxable according to the course and practice of the court, or by express provision of law." Evidence was introduced at the hearing touching the course and practice of courts in this connection. None of this, however, justifies the conclusion that it has become, by positive rule or custom, the course and practice of the court in the second district, or in any other district in this state, to tax any such items; nor has our attention been called to any express provision of law on the subject. The courts may establish their own course and practice by rules not inconsistent with law. Code Civ. Proc. §§ 111, 112. If reasonable in their requirements, and uniform in application, they have the same force as a statute. A rule touching the costs referred to in the last clause of the statute *supra,* so far as they are not governed by other express provisions of law, would perhaps fall within the purview of this power. Until such rule has been established, or until by custom it has become the rule to allow them, they cannot be taxed.

But it is said by counsel for the plaintiff that all of these disbursements were necessary, and should be allowed, at the discretion of the court, under a liberal construction of the section of the statute quoted. The argument based upon necessity might with propriety be addressed to the legislative branch of the government. Courts, however, are bound by the statute, no matter what may be the necessities of the case, and may not go beyond its express provisions. It may be within the power of the legislature to lodge the whole matter of costs in the discretion of the courts, but until it does so they have no discretion in adjudging them, except in the class of cases mentioned in sections 1853 and 1855 of the Code of Civil Procedure, among which the present case does not fall.

It is also said that the models used at the trial to illustrate the evidence and contentions of the parties are in fact maps, and the necessary expenses of preparing them should be allowed as for maps "required and necessary to be used on the trial of the hearing." A map is a drawing upon a plane surface representing a part of the earth's surface, and the relative position of objects thereon. It may also be so drawn, as was the case here, to show the geological structure and other physical facts necessary to a complete understanding of the matter at issue. A model is a fac simile in three dimensions, —a reproduction in miniature of the object under investigation. The one in controversy here is a miniature reproduction in three dimensions of the underground workings of defendant's mine, showing the shafts, tunnels, drifts, crosscuts, etc., in all their details. From its very nature, it does not fall within any definition of the word "map," and it is a misapplication of the term to call it a map, though it may far better serve the purpose in hand.

For some reason not explained, the official stenographer did not attend the trial, and by agreement each party employed its own stenographer to report the evidence. This was done

by consent of the court, and both of the stenographers thus employed took the oath required by law of official stenographers. The item charged for expenses for stenographer and copies is made up of per diem paid by the plaintiff to its own employee, and for copies of the evidence furnished by him to the plaintiff's counsel from day to day to aid them in the examination of witnesses. It is contended by counsel for plaintiff that this item is properly chargeable under the head of "legal fees paid stenographers for per diem or for copies." The per diem referred to, however, is the legal fee paid by each party at the beginning of the trial, under section 374 of the Code of Civil Procedure, and the copies mentioned are such as are provided for in section 373, to be used in the preparation of bills of exception or statements on motion for a new trial. Legal fees are such as are fixed by law, and there is no requirement of law to pay stenographers' fees, except in the section cited, fixing fees to be paid to official stenographers appointed by the court under authority of section 370. All items complained of must therefore be disallowed.

In order to present the matter of costs to this court, the defendant reserved its exceptions to the order taxing costs, and made the bill embodying them a part of the record on appeal from the judgment. It also took an independent appeal from the order taxing costs. The questions involved are properly reviewable on the appeal from the judgment. An appeal does not lie from the order. *Murray* v. *Railway Co.* 26 Mont. 268, 67 Pac. 625. The appeal from this order is therefore dismissed.

The order denying a new trial is affirmed. The cause is remanded, with directions that the court below modify the decree by disallowing the items of costs complained of, and by limiting the extent of plaintiff's extralateral rights toward the west by fixing the west boundary planes in the direction of the line, L, M, as indicated on diagram 1, at the points where the different veins pass through the line E, F. When so

modified, the decree will be affirmed. The defendant will recover one-half of the costs of appeal.

Modified and affirmed.

MILBURN, J. I concur in the opinion of the chief justice, and in the conclusions reached and stated by him. As to the matter of the right of trial by jury, I am, as he is, of the opinion that, when the constitution was framed and adopted, the framers thereof and the people were supposed to know what the then right of trial by jury was, and the provision of the instrument referred to was adopted with its meaning to be understood in the light of the law as to the right of trial by jury as adjudicated at the time of such adoption. Nothing in the opinion or conclusions of the chief justice should be understood as invading the right of the people to trial by jury as they had it at the time of the adoption of the constitution, and this case may be only a precedent as to what the law affecting such right shall be under circumstances similar to those appearing in the record of the appeal now here decided.

PIGOTT, J. Trial by jury of the legal title to the ore bodies in controversy was, as I believe, a matter of right. For this reason I dissent from the conclusion announced in paragraph numbered 2 of the foregoing opinion, and shall, if other duties permit, hereafter express my views upon the subject. With this very important exception, I agree with the results reached upon the other questions considered in the opinion.

Rehearing granted February 3rd, 1903.

B. P. BURTON v. FOREST OIL CO.

(204 Pennsylvania 349; 54 Atl. 266. Supreme Court. Jan. 5, 1903.)

[1]**Assignee of half interest held for all the rent.** A lessee of a gas lease, under which he was to pay a certain royalty, assigned an undivided one-half interest therein to a corporation, to hold subject to the royalty contained in the lease, and thereafter assigned the other one-half interest to a second company. The first corporation operated the land under an agreement to account to the second company for one-half of the proceeds, the latter company to pay one-half of the expenses. *Held*, that the first company was liable for the whole of the royalty.

[2]**Trade meaning to "gas" disallowed.** A lease granted the right to drill for oil and gas, with a provision for a certain rental if gas was obtained, and without any distinction as to whether the gas was derived from gas or oil wells. *Held*, that the evidence was inadmissible to show that the word "gas" as used in the lease in trade usage meant gas derived from a gas well, and not gas from an oil well.

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[1]Where the assignee of an interest in a lease agrees to pay the assessments against his own and his assignors' remaining interest, up to $1,000 his interest cannot be forfeited for a single month's shortage, nor until the full $1,000 is due. *Shaw* v. *Horner*, 7 Colo. App. 83; 42 Pac. 689.

Assignment of lease after expiration of the term carrying only right to back damages need not be under seal. *Indianapolis Co.* v. *Pierce*, 25 Ind. App. 116; 56 N. E. 137.

The holder of oil leases assigned them, the assignee agreeing to pay $100 for each lease if he should operate under them: *Held* that defendant was not estopped to surrender the leases and take new ones from the owner. *Smith* v. *Munhall*, 139 Pa. 253; 21 Atl. 735.

Assignment of lease for cash and a bonus if oil is struck; the agreement to pay the bonus is personal and does not run with the land. *Fisher* v. *Guffey*, 20 M. R. 174.

Contract to furnish natural gas to factory for special purposes held nonassignable. *Sargent Glass Co.* v. *Mathew Land Co.* 35 Ind. App. 45; 72 N. E. 474.

[2]The Kentucky act making it a penal offense to allow gas to go to waste construed and held valid. The act allows adjoining owners to plug the well where the owners leave it open and idle. *Com.* v. *Trent*, 25 K. L. R. 1180; 77 S. W. 390.

Appeal from Court of Common Pleas, Butler County.

Assumpsit by B. P. Burton against the Forest Oil Company to recover rental under an ore and gas lease. Judgment for plaintiff for $2,674.75, and defendant appeals.

Affirmed.

Ferdinand Reiber, a witness, was asked this question:

"Q. Now, Mr. Reiber, I want to ask you this question: In an oil and gas lease, where this term is used, 'If gas is found in sufficient quantities to utilize,' whether in the trade that means gas derived from an oil well that cannot be marketed and that is dangerous to use, or it means gas obtained from a gas well which can be connected with the pipe line and run to market?"

(Objected to until the purpose is shown.) Mr. Campbell: The purpose of this offer is to show the definition of the word 'gas,' as used in contracts of this kind in the business. Mr. Bowser: I object to this offer for the reason that the contract between the plaintiff and the defendant is defined by explicit words, intelligently and without any ambiguity, and to attempt by custom to overrule, or an alleged custom to overrule, a contract between the parties, would not be admissible evidence. The question is further objected to because the tendency and purpose is to construe a contract different from what it is written between the parties themselves. Furthermore it is objected to because it is asking the understanding of the witness as to the construction of an instrument which is a question of law, and is for the court, and in

The lessee has no such ownership in natural gas that he can deliberately waste the product of his wells with intent to drain the territory and destroy competition. *Louisville Co.* v. *Kentucky Co.* 25 K. L. R. 1221; 77 S. W. 368.

Construction of lease with regard to peculiar nature of gas, and implied covenant to work. *McKnight* v. *Manufacturers' N. G. Co.* 17 M. R. 429.

Natural gas exempt from duty under tariff. Nature of gas and bitumen as minerals considered. *U. S.* v. *Buffalo Co.* 78 Fed. 110.

no event would the testimony be admissible. The Court: Objection sustained, and bill sealed for the defendant. [1]

"Q. In the oil and gas trade or business, state whether or not the expression 'gas obtained in sufficient quantities to utilize' has a well defined meaning, and if so what it is?" Mr. Bowser:

This question is objected to and the testimony, for the reason that here is a written contract by which the parties have come together, plaintiff and defendant, and becomes a question now, and it is the main question before this jury, whether or not this gas was used and sold for other purposes than operating this lease, and if the defendant has already used it and sold it he has decided himself that it is in sufficient quantities to use, and he would be estopped from now setting up a defense to the payment of it when he so decided to use it. The Court: I think that would be going a little too far. We will sustain the objection, and seal a bill for defendant. [2]

The court charged in part as follows:

"The defendant company was only the owner of the undivided one-half; the Chartiers Oil Company the owner of the other undivided one-half. If this were a case of ordinary rent or rental, where no oil or gas was taken from the land, and the defendant was sued, the plaintiff could only recover for the one-half, or if this was an action brought to recover for oil or gas not marketed, as is claimed sometimes where they find gas in paying quantities, and should be marketed, and no gas was taken away, then we would say to you that the defendant would only be liable for the one-half of the rental; but the question here is different. The defendant company here, if it took the gas, took it all, or at least took all that was taken, and when they took any beyond what was necessary to run the boiler and engine on the Burton lease, they would then become liable at the rate of $500 a year. We think the rule would be different where the defendant company got the product. The fact that the defendant company took the gas, if you find that it did take it, then, we think, it having taken the gas, would be liable for the whole amount of rental, for whatever time it took the gas, and that is for you to determine from the testimony." [4]

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Errors assigned were, among others, the rulings on evidence 1 and 2, *supra,* and the charge 4 above quoted.

T. C. CAMPBELL, R. W. CUMMMINS, and W. D. BRANDON, for appellant.

S. F. BOWSER and A. L. BOWSER, for appellee.

MESTREZAT, J. B. P. Burton, the plaintiff and appellee, by an agreement dated April 3, 1889, leased to W. S. Guffey and Emmet Queen his farm of 36 acres in Butler county for the purpose of drilling and operating for petroleum, oil, or gas for the term of 10 years, or thereafter while oil or gas was produced in paying quantities or the rental was paid. The agreement required one-eighth of the oil produced on the premises to be delivered to the lessor, and then provides as follows:

"It is further agreed that if gas is obtained in sufficient quantities to utilize, the consideration in full of the party of the first part shall be five hundred dollars ($500) per annum for each and every well drilled on the premises herein described, as long as the same is utilized, payable at T. Mellon's Bank, Pittsburg, Pennsylvania."

In August, 1889, Guffey and Queen assigned the lease to J. M. Guffey, who, by an assignment dated November 15, 1890, assigned to the Forest Oil Company, the defendant and appellant here, an individual one-half interest therein, "to have and to hold the said interest in the above-described lease, leasehold and premises, subject to all royalties, rents and covenants of the lessee therein contained to be rendered, paid and performed on and after November 8, 1890." By another assignment, dated February 1, 1890, the other un-

divided one-half interest in the lease was vested in the Chartiers Oil Company. A well was drilled on the demised premises in the fall of 1889, producing large quantities of oil and gas. The Chartiers Oil Company had the management and control of the lease until January, 1893, when the Forest Oil Company, the defendant, took possession of the premises and operated the well for oil and gas until 1898. The jury found that the well produced gas in sufficient quantities to utilize, and that the appellant company did utilize it while it had possession of the premises. This action is assumpsit and was brought by the plaintiff to recover the gas rental of $500 per annum, alleged to be due from the appellant company during the time it had the management and control of the leased premises. The case was submitted to the jury, and a verdict was returned for the plaintiff, upon which judgment was entered. The defendant company has appealed.

There are two questions raised by the assignments: (1) Is the plaintiff entitled to recover the whole gas rental from the defendant? and (2), did the court err in refusing to permit the defendant to show the trade meaning of the word "gas" in leases of this character?

We are unable to see how the defendant company can relieve itself from liability for the claim of the plaintiff. The assignee of the lease is liable for the rental of the premises by reason of the privity of estate existing between him and the lessor. The same is true of any subsequent assignee of the lease. Here the defendant company denies its liability for the one-half of the rental, because, as it claims, the undivided one-half interest in the lease was assigned to the Chartiers Oil Company by the assignee of the lessees. We are not called upon to determine the right of the lessor to recover against the Chartiers Oil Company for any part or all of the gas rental due the plaintiff. It may be that he could recover the whole rental in a joint action against the two companies, or the one-half of the rental from each company in an

action against them severally. But, under the facts in this case, why is not the Forest Oil Company liable for the whole rental? The jury has found that it was in exclusive possession of the demised premises, and that it received and utilized the entire gas product. The possession and beneficial enjoyment of the premises for gas purposes by the defendant company were as complete and exclusive as the lessees were entitled to under the terms of the lease. The defendant enjoyed all the benefits conferred by the covenants of the lessor. It took possession and operated the gas well under the assignment from the lessees' assignee, "subject to all royalties, rents and covenants of the lessee therein contained, to be rendered, paid and performed on and after November 8, 1890." It therefore held and operated the well under the covenant in the lease to pay the entire gas rental, which, by reason of the privity of contract, the lessor could have collected from the lessees.

If, as claimed by the appellant, the Chartiers Oil Company received from it the one-half of the proceeds of the gas produced, to which the latter was entitled under the assignment of the undivided one-half interest of the lease, then it can enforce contribution against the Chartiers Company for its share of the rental. In fact, the evidence tends to show that contribution was made by the Chartiers Company as the rental became due. An officer of the appellant company testified that his company rendered statements to the Chartiers Oil Company for one-half of the amount expended in running the business, and that the bills were paid. But if the appellant company has not received from the Chartiers Oil Company the one-half of the rental for the premises, it can be no hardship, under the circumstances disclosed here, to require it to compel contribution, otherwise to bear the loss against which it had the means in its hands to protect itself. From the testimony it is evident that the appellant took charge of the premises and well, and utilized the gas, under

an agreement by which it was to pay the Chartiers Oil Company for the one-half of the gas produced, and the latter was to be responsible for one-half of the expense in producing it. The plaintiff was not presumed to, nor did he, have knowledge of the existence of any arrangement between the parties by which the well was operated. He saw the appellant company in exclusive possession of the premises, taking and utilizing the gas. This was the extent of his knowledge as to the party operating under the lease. Under its assignment, the appellant had, as against the appellee, the right to the possession of the premises for the purpose of operating for gas. The plaintiff could not interfere with or control the appellant in the exercise of this right. As the company, therefore, had, by virtue of its assignment, the beneficial enjoyment of the premises as fully as the lessees could have had under the lease, the obligation is upon it to perform their covenants to pay the gas rental to the plaintiff.

The learned trial judge was right in excluding the testimony offered for the purpose of showing the trade meaning of the word "gas" used in the lease between the plaintiff and Guffey and Queen. The purpose was to show that in the oil and gas business the word "gas," as used in such contracts, means gas derived from a gas well, and not from an oil well. The lease granted the right to drill and operate for "petroleum oil or gas," and provides that, if gas is obtained in sufficient quantities to utilize, the consideration therefor should be $500 per annum for each well drilled on the premises. The meaning of the word is neither ambiguous nor uncertain, but is well understood. Nor does the connection in which it is used give it a meaning requiring parol evidence to explain it. The offer was in effect not to explain, but to contradict, the explicit provisions of the contract, by showing that the lessees were to pay for the gas only on condition that it was produced or derived from a gas well. This would have been in direct opposition to the agreement,

and in conflict with its terms. The lease, as we have seen, granted the right to drill for oil and gas, but the consideration to be paid for the gas did not depend on whether it was derived from an oil well or a gas well, but whether the gas was "obtained in sufficient quantities to utilize." Parol evidence is not admissible for the purpose of making a new and different agreement for the parties, and hence the evidence, the rejection of which is complained of by the appellant, was properly excluded.

The assignments of error are overruled, and the judgment is affirmed.

THOMAS N. KING ET AL. v. NEW YORK & CLEVELAND GAS COAL CO.

(204 Pennsylvania 628; 54 Atl. 477. Supreme Court. Jan. 5, 1903.)

When the description in a deed or devise is clear and explicit and without ambiguity, there is no room for construction or for the admission of parol evidence, to prove that the parties intended something different.

Attempt to confine deed of all coal to one seam. Where an executor's deed conforming to the petition supporting the same, purported to convey all the coal underlying a certain area, parol evidence was not admissible to show that it was intended to convey only one certain seam of coal underlying the surface.

Appeal from Court of Common Pleas, Allegheny County.

Ejectment for coal under land in Plum township by Thomas N. King and others against the New York & Cleveland Gas Coal Company. Judgment for plaintiffs, and dedendant appeals. Reversed.

Previous conversations not allowable to explain understanding when conveyance is plain in its terms. *Bryan* v. *Idaho Co.* 73 Cal. 249.

Where land is conveyed to an association parol evidence is admissible to show respective interests. *Pratt* v. *California Co.* 24 Fed. 869.

It may be shown that a lode conveyed under one name is the same as that called by another name. *Manning* v. *Strehlow*, 11 Colo. 451; 12 Pac. 625. *Shoshone Co.* v. *Rutter*, 19 M. R. 356.

Deed of "one-half of the mineral interest in said lands" construed in connection with context and intent of parties to carry the whole mineral interest. *Brown* v. *Cranberry Co.* 59 Fed. 435.

Deed of surface interference "together with all the mineral," etc., held not to deprive the grantor of the right to dip underneath. *Montana Co.* v. *St. Louis Co.* 102 Fed. 430.

An uncompleted location may be the subject of conveyance. *Miller* v. *Chrisman*, 140 Cal. 440; 73 Pac. 1083. Or of verbal transfer. *Doe* v. *Waterloo Co.* 18 M. R. 265.

At the trial, when Henry M. Johnson was on the stand, he was asked this question:

"Q. Mr. Johnson, did you at that time know of any other coal underlying that land except the Pittsburg vein? (Objected to as irrelevant and incompetent. Objection overruled, and bill sealed for defendant.) [1]

"A. I did not know of any vein under that at that time."

J. S. King was asked this question:

"Q. Did you know of a coal vein in that farm? A. None but the Pittsburg vein, or what we call the upper vein—(Objected to. Objection overruled, and bill sealed for defendant.)" [2]

W. D. Alter was asked this question:

"Mr. Alter, this affidavit sets forth that you are acquainted with the value of the property in the vicinity of the property described in the within petition, and that you believed the price of $75 per acre for coal of the estate of Thomas King, deceased, is a fair price, and as much as any coal in the immediate vicinity is sold for, and is as much and even more than could be obtained for the same at public sale. Now, I ask you what coal did you refer to in that affidavit?

Construction of a deed reserving right to open "a supposed paint mine" within a defined limit of time with the holding that, construing certain conveyances together, one of two co-tenants, became vested with the sole ownership in the mine. *New Haven* v. *Hotchkiss*, 58 Atl. 753.

A deed transferred a coal vein "said to be about 65 acres." It was found to contain only 38 acres. In the absence of fraud held no case to abate the purchase price. *Cook* v. *Cook*, — W. Va. —; 48 S. E. 757.

Deed construed as not conveying lode exterior to its boundaries, having extralateral rights underneath the surface conveyed. *Central Co.* v. *E. Central Co.* 146 Cal. 147; 79 Pac. 834.

Construction of contract and deed of mining claims with the holding that the recital of length and width conveyed, was explained and limited by other recitals. *Sumpter Co.* v. *Browder*, 31 Colo. 269; 73 Pac. 38.

Omission of one entire line in a description by metes and bounds held not fatal. *Mitchell* v. *Hutchinson*, 142 Cal. 404; 76 Pac. 55.

"(Objected to because the coal referred to in that affidavit is described in the petition to which that affidavit refers, and it is immaterial so far as we are concerned, and besides the witness is asked to give an interpretation to his affidavit, which is perfectly clear of itself, and which may tend to change its tenor. Mr. Coleman being dead, and this being one of the parties who made this affidavit, it is incompetent to make any explanation of his affidavit, or to testify to any subject-matter of that transaction, because of the death of Mr. Coleman. Objection overruled. Exception and bill sealed for defendant.) [3]

"A. We referred to the merchantable coal on the Briar farm at that time—the Pittsburg vein only."

Defendant presented this point: "(15) That under all the evidence in this case the verdict of the jury should be for the defendant. Answer. Refused." [15]

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

S. SCHOYER, JR., H. K. SIEBENECK, and JOHN P. HUNTER, for appellant.

R. B. PETTY and JOHN M. PETTY, for appellees.

MESTREZAT, J. The learned trial judge should have withdrawn this case from the jury, and directed a verdict for the defendant.

Thomas King died in 1866, testate, seised of two tracts of land, not contiguous, situate in Plum township, Allegheny county, the larger of which contained 153 acres and was known as the "King Farm," and the smaller contained 98 acres and was known as the "Briar Farm." The personal estate of the decedent being insufficient for the payment of his debts, his surviving executors, in 1871, obtained an order from the orphans' court of Allegheny county to sell certain coal under said land of the testator at private sale for the payment of debts. The property was sold to William Cole-

man, the sale was confirmed by the court, and the executors executed and delivered a deed conveying it to the purchaser. In 1872 Coleman conveyed the coal to the New York & Cleveland Gas Coal Company, the defendant in this action.

This ejectment was brought in 1899 by the devisees under the will of Thomas King to recover a tract of land in Plum township, containing 64 acres and 55 perches, and "all coal and coal rights therein and thereunder." The plaintiffs claim title under the will of Thomas King. The defendant disclaims title to the real estate described in the præcipe, except " all the coal in and underlying the land described in the writ," with certain mining rights and privileges, the title to which coal and mining rights is claimed by the defendant by virtue of the sale for the payment of debts in pursuance of the order of the orphans' court, and the subsequent vesting of the title in the defendant by the deed of William Coleman. The plaintiffs deny that the proceedings in the orphans' court vested the title to any part of the real estate in Coleman, for the reason, as claimed by them, that the court had no authority to order a private sale for the payment of debts, and they also deny that, if the court had authority to make the decree, it authorized the sale of any coal except the "upper or Pittsburg vein" of coal under the land described in the præcipe and writ in this case. The learned trial judge held that the orphans' court sale devested the title to the property sold, but, against the objection of the defendant, submitted to the jury to determine "whether the Pittsburg vein alone answers the description of the 'body of coal' referred to in the executor's petition," on which the order of sale was made. On this issue the jury found a verdict in favor of the plaintiffs, and from the judgment thereon the defendant company has appealed.

The petition presented by the executors to the orphans' court averred, *inter alia,* that the testator died seised of certain real estate in Plum township, "under a portion of which

lies a body of coal;" that it would be to the interest of all parties that "the coal underlying the said real estate" should be sold; that the deferred payments should be secured by a mortgage on the premises for "the whole of said coal underlying the surface of said testator's land, with all mining privileges," etc.; that "the coal has been surveyed, and is bounded and described as follows." A description is then given in the petition by courses and distances, and the acreage is stated to be 64 acres and 55 perches. The prayer is for the approval and decree of a private sale of "the coal above described with the privileges aforesaid." The court decreed a private sale of "the coal and privileges" mentioned in the petition. The executors made a deed to the purchaser, reciting that the testator died seised of "certain lands and coal thereunder" in Plum township; that they were authorized to sell "the coal underlying the testator's land hereinafter described;" and conveyed to the purchaser "all the following described coal" within the boundaries there given. After the delivery of the deed, the executors made a report to the court that in accordance with the decree of sale they had "executed and delivered to William Coleman a deed in fee simple for the coal described in the petition aforesaid, with the privileges, etc., therein enumerated."

It is contended by the plaintiffs, and it was held by the court below, that they had the right to introduce parol testimony to show that the words used in the orphans' court proceedings, descriptive of the subject-matter of these proceedings, applied to the Pittsburg vein of coal, and not to all the coal underlying the premises within the designated boundaries. The testimony was offered and admitted under the well-settled rule that extrinsic evidence is admissible to identify the subject-matter of a written instrument where the description is applicable to more than one thing or object. In such cases the purpose is to discover the intention of the party as shown by the words he has used, and for that purpose

parol testimony is necessarily received. But it is equally clear under all the authorities that extrinsic evidence is not admissible where there is a subject-matter that satisfies the terms of the written instrument. Starkie on Evidence, *693; *Saunderson* v. *Piper,* 5 Bing. N. C. 425, per Tindal, C. J.; *Cook* v. *Babcock,* 61 Mass. 526; *Harvey* v. *Vandegrift,* 89 Pa. 346. Mr. Starkie says: "When a subject-matter exists which satisfies the terms of the conveyance, there is no latent ambiguity, and no evidence can be admitted for the purpose of explaining the terms of the deed of conveyance." And in *Cook* v. *Babcock* it is said by Shaw, C. J., speaking for the court, that when the description in a deed or devise is clear and explicit, and without ambiguity, there is no room for construction, or for the admission of parol evidence, to prove that the parties intended something different.

Applying these principles to the case in hand, we think that extrinsic evidence was not necessary, and hence not admissible, to discover or ascertain the subject-matter to which the language used in the orphans' court proceedings, descriptive of the property to be sold, applied. We have recited above the terms used throughout the proceedings. The "body of coal" referred to in the first part of the petition is clearly defined and explained in the subsequent parts of the petition to be "the coal underlying the said real estate," and "the whole of said coal underlying the surface." It was to the interest of the parties concerned, as averred in the petition, not that the "body of coal," but that "the coal underlying the said real estate of said testator," should be sold. This is a distinct averment of the petition, and clearly referable thereto in the subsequent parts of the petition are the expressions "the whole of said coal underlying the surface of said testator's land," which was to be mortgaged, and "said coal" which was surveyed and described in the petition. It was this coal designated as "the coal above described" which the executors, in the petition, asked for an order to sell.

There is therefore no uncertainty or ambiguity in the terms employed in the petition or the decree of the court to designate the property to be sold. It was the coal, and not a part of the coal, underlying the surface particularly described in the petition. While the deed conveys only what the executors were authorized by the court to sell, yet they will not be presumed to have exceeded their authority, and to have granted to a purchaser property they could not convey. The deed of the executors to Coleman recites that King became in his lifetime seised "as of fee of certain lands and coal thereunder" in Plum township, and conveys "all the following described coal," giving a description of the land by courses and distances as set forth in the petition presented to the orphans' court. This deed, the act of the parties who represented the estate of decedent, confirms the interpretation we have put on the language used in the petition. The property thus conveyed was reported to the court by the executors as "the coal described in the petition," and the sale thereof was confirmed in accordance with the prayer of the executors. The action of the court and of the executors throughout leaves no doubt and creates no ambiguity as to the quantum of coal sold and conveyed.

Had the word "seam," "vein," or "strata" been used, the position of the plaintiffs would have had some ground to support it. Had the application been for an order to sell the seam, vein, or strata of coal underlying the surface, extrinsic evidence would have been necessary to determine which of the several seams or strata beneath the surface was embraced in the petition and decree of the court. Neither of these words, however, was used, but, instead, language was employed which clearly designates the subject-matter of the proceeding in the orphans' court, and leaves no doubt as to what property was sold and conveyed by its authority.

We are all of opinion that under the evidence presented to the court below the plaintiffs were not entitled to recover,

and that a verdict should have been directed for the defendant company.

The fifteenth assignment of error is sustained, the judgment is reversed, and judgment is now directed to be entered for the defendant company for the coal underlying the surface described in the deed of Thomas King's executors to William Coleman, dated April 29, 1871, and recorded in the recorder's office of Allegheny county in Deed Book, vol. 274, p. 108.

CHARLES F. JONES v. GEORGE B. HOLDEN ET AL.

(182 Massachusetts 384; 65 N. E. 808. Supreme Judicial Court. January 6, 1903.)

Prospector's application for license not assignable. Plaintiff had applied for but not yet obtained a license to mine for gold in Nova Scotia. The license, when obtained, was assignable, but any party doing work before the license issued was punishable criminally. Plaintiff nevertheless assigned to defendants the acreage applied for and defendants agreed to do a certain amount of work. *Held*, that defendants could not be held to a contract which required of them to do acts in violation of law.

A custom to do an act made punishable by law cannot be proved.

Exceptions from Superior Court, Suffolk County; Elisha B. MAYNARD, Judge.

Action by Charles F. Jones against George B. Holden and another. A verdict was directed in favor of defendants, and plaintiff brings exceptions. Overruled.

In suit on contract to drill oil well including casing it is error to allow proof of custom for the owner to furnish the casing. *Moore* v. *Kennedy*, 81 Tex. 144; 16 S. W. 740.

If usage be notorious in the trade (coal trade) it is not necessary that it be notorious to the world at large. *Watson* v. *Peache*, 1 Bing. N. C. 661.

Custom pleaded of user for 30 years to take clay from a certain close for a certain brick kiln, held unreasonable and bad. *Clayton* v. *Corby*, 5 Q. B. 415.

Law reports not allowed to be read to the jury in proof of local custom. *Iron Co.* v. *Buhl*, 42 Mich. 86.

Contract held subject to usage of coke manufacturer to distribute cars ratably when there was a shortage. *McKeefrey* v. *Connelsville Coke Co.* 56 Fed. 212.

"Custom of the port," in loading coal, explained. *In re 1100 Tons of Coal*, 12 Fed. 185.

A custom that a prospector under a verbal license has the right to work out his find is void as against the Statute of Frauds. *Entwhistle* v. *Henke*, 211 Ill. 273; 71 N. E. 990.

Plaintiff entered into a contract with defendants, which recited that plaintiff "held" 102 gold areas in the Mill Village gold district, in Queens county, province of Nova Scotia, and that in consideration of $1, paid to him by defendants, he transferred all his right and title to said areas to defendants on defendants paying him $1,000, and on their agreement to pool for plaintiff certain shares in a corporation to be formed. Defendants further agreed to expend $500 in development work, which should be done on plaintiff's areas so conveyed. Nothing, however, was done by either party after execution of the contract, for breach of which by defendants plaintiff brought suit.

W. N. BUFFUM and F. S. ELLIOT, for plaintiff.

JAS. H. DEVLIN, JR., for defendants.

KNOWLTON, C. J. The decision of this case turns on the construction of a contract in writing, for breach of which this action is brought. Apparently neither the plaintiff nor the defendants ever did anything under the contract after it was signed. The breaches alleged were that the defendants failed to expend $500 in the work of development prospecting for gold upon the areas referred to in the writing, and failed to pay fees to the government on these areas to renew the plaintiff's rights. The Revised Statutes of Nova Scotia, which were put in evidence, are important in testing the validity of the plaintiff's claims. All the rights the plaintiff had when the contract was made, or at any time afterward, grew out of his applications for a prospecting license for these areas, and his payment of the fee required by statute to be paid on the filing of such applications. He had no right to prospect or to do anything upon the land until he should first obtain a prospecting license. The words "to mine" are defined in the statute in such terms as plainly to

include the development mentioned in the contract. Rev. St. Nova Scotia 1900, c. 18, § 2. Mining without first having obtained a lease or license is punishable criminally under the statute. Chapter 18, § 32. A license could not be obtained under the plaintiff's application without his first filing a bond with two sureties for the protection of private landowners, substantially in the form prescribed by the statute. Chapter 18, § 157. After obtaining such a license, it could be transferred under the statute, but until the license should be issued, the plaintiff had no legal right which he could transfer.

The contract to expend not less than $500 in the development of the mines, if it is to be construed to require such development by the defendants with no other pretense of authority than the plaintiff's application, was a contract to perform a criminal act, which cannot be enforced.

Evidence from the plaintiff's witness that there was a general custom in Nova Scotia to violate the law in this particular was incompetent. If the fact were as the plaintiff offered to prove, it would not put upon the defendants a legal obligation to do that which was forbidden by the statute under a penalty.

If the contract is to be given validity, it can only be upon the construction that there was an implied understanding that the plaintiff should give the bond with sureties, and obtain the license, without which the defendants could legally do nothing; and that the defendants should then go on under his authority. Inasmuch as no one but the plaintiff had a legal right to do this, and as he did nothing, the conditions did not arise which might have put upon the defendants the obligation to expend this money.

The same condition applies to the stipulation that the defendants shall "pay the government fees on said areas that may be necessary to renew them." The only provision in the statute for the renewal of rights of this kind is for the re-

newal of a license. Chapter 18, § 36. There is no provision for the extension of an application beyond the year within which the license was issued. Until the license was issued, there was nothing to renew, and no license was ever issued.

Exceptions overruled.

FRANK M. TAYLOR ET AL. v. CHARLES H. THOMAS ET AL.

(31 Colorado 15; 71 Pac. 381. Supreme Court. Jan. 12, 1903.)

[1]**Non-assessable interest. Monthly rests.** Plaintiffs, owners of one-half interest in a lease, assigned two eighths of the whole to defendants, owners of the other half, in consideration of the assignees' undertaking the whole expense of mining and treating the assignors' two-eighths as non-assessable. Accounts were to be rendered monthly. *Held*, construing the contract, that monthly rests are not favored in law and were not intended by the parties, and that the entire expenses of the lease were to be deducted to find the balance due.

Profits do not exist until after expenses are paid.

Estoppel by receipt of shares. When monthly statements are rendered and the balances shown by such statements accepted and receipted for, the parties will not be heard to assert a different construction and excuse their failure to protest by fear that plaintiffs would cease to assume the risk of working.

Buying right to work by instroke. A share of profits paid the owners of adjoining workings to enable the lessees to get at the leased ore was a legitimate item of expense.

Royalties not expenses. A contract to work and divide the profits refers only to the ore the lessees received as their share. The royalty was a primary charge on the output and the sole property of the lessor.

Appeal from District Court, Arapahoe County.

Action by Charles H. Thomas and another against Frank M. Taylor and another. Judgment for plaintiffs. Defendants appeal. Plaintiffs assign cross-errors. Reversed.

[1]See notes to *Maloney* v. *Love*, 19 M. R. 310.

Smelter, holding proceeds of ore until litigation settled, held for interest on the deposit. *Boston Co.* v. *Reed*, 23 Colo. 523; 48 Pac. 515.

An accounting will not be ordered against a hostile title until title first settled. The instances stated where an account lies in equity. *Tecumseh Iron Co.* v. *Camp*, 17 M. R. 388.

Smelter returns construed as meaning returns from the ore less the smelting charges only, without deducting hauling or freight. *Frank* v. *Bauer*, 19 Colo. App. 445; 75 Pac. 930.

JOHN A. EWING and MORRISON & DE SOTO, for appellants.

BELFORD & BELFORD (H. R. BELFORD, of counsel), for appellees.

CAMPBELL, C. J. Action to recover profits accruing under a lease. On the 29th day of December, 1896, Charles H. Thomas and John F. Johnson, plaintiffs below (appellees here), and Frank M. Taylor and W. S. Copeland, defendants below (appellants here), secured from its owner a lease on the Fanny Rawlings mine, at Leadville, to run for a period of three years, at a specified royalty to be paid the lessor by the purchaser of the product of the mine. Each of the lessees owned an undivided one-fourth interest in the lease, and was to bear one-fourth of the expenses of operating the mine, and to receive one-fourth of the net earnings of the lease. These four lessees having jointly operated the mine under their lease for a period of about 13 months, to wit, until the 21st day of January, 1898, their interests and rights were, by an agreement made on that day, modified to the extent that plaintiffs, Thomas and Johnson, each transferred and assigned to Copeland and Taylor, the defendants, a one-eighth interest in the lease, so that after January 25, 1898, when the contract went into effect, Thomas and Johnson retained each a one-eighth interest, and Copeland and Taylor each a three-eighths interest. To the latter was delegated entire control in operating the mine, and they were required to render to their associates monthly statements showing receipts and expenditures.

After this new agreement was made, the mine was worked, and ore extracted therefrom shipped and sold to a smelter, monthly statements furnished and received, until some time in October, 1899, when by consent of all parties the lease was surrendered to the lessor.

After the agreement of January 21st was made, defend-

ants entered into a separate contract with the Big Four Mining Company, by which they acquired the right and privilege of carrying on work in the Fanny Rawlings mine through the workings of the Big Four Company; and, as a consideration therefor, defendants agreed to pay to the Big Four Company three-eighths of the profits of the lease on the Fanny Rawlings mine. In accordance with the requirements of the lease, defendants furnished to the plaintiffs monthly itemized statements of account, and also upon the termination of the lease and the closing up of the business they rendered to the plaintiffs a final account recapitulating the business done during the lifetime of the lease, from which it appeared that from January, 1898, to September of that year, the expenses exceeded the receipts by $14,101.01; that in September the lease began to pay, and showed a profit of over $2,000, which was charged up against the losses, or excess expenses up to that date. The months of October, November, and December of that year each showed a profit which aggregated more than sufficient to offset all expenses to that date, so that the statement for the month of December showed a dividend of $180 for each one-eighth interest in the lease, which amount was paid to each of the plaintiffs in January, 1899, and receipted for by them. Every month thereafter up to the time the lease was surrendered in October, 1899, there was a net profit.

The monthly statements showed clearly how the accounts were kept, all items with which the plaintiffs were charged, and receipts for the ores and balance due; and each one of the plaintiffs signed a receipt acknowledging the payment of the different sums of money from time to time, as per the statement furnished them. During the entire life of the lease the plaintiffs never made demand on the defendants for any additional sum, nor was any objection made by them to the accounts as furnished until about three months after the lease was surrendered, when this action was brought by plain-

tiffs to recover a balance which they claimed to be due under the new arrangement, in the aggregate sum of $24,362.02, upon three separate items of account,—the first for an undivided one-fourth interest of $14,101.01, the amount of the excess expenses over the receipts up to the 1st of September; the second for the amount paid by the defendants to the Big Four Company for the privilege of working the Fanny Rawlings mine through the workings of that company, and which defendants deducted from the receipts of the mine before the distribution of profits; and the third was for plaintiffs' alleged interest in the rovaltv paid by defendants to the lessor.

The trial court found in favor of defendants on the second and third, and in favor of plaintiffs on the first count, and upon the latter finding rendered a joint judgment against defendants for $3,525.25, which by this appeal defendants seek to reverse. The plaintiffs have purported to assign cross-errors to the findings against them on the two items mentioned.

There are no disputed questions of fact. The question is solely one of law, and its solution depends upon a construction of the terms of the contract of January 21st, the material parts of which are here reproduced:

"First. In consideration of W. S. Copeland and F. M. Taylor assuming and agreeing to pay all expenses of the lease incurred after January 25th, 1898, Charles H. Thomas and John F. Johnson hereby agree to transfer and assign, and do hereby transfer and assign, to W. S. Copeland and F. M. Taylor, each, one-eighth interest in and to said lease, and W. S. Copeland and F. M. Taylor do hereby agree to pay all expenses incurred after January 25th, 1898; it being the mutual intention that the respective interests after January 25th shall be as follows, viz.: Charles H. Thomas and John F. Johnson, each one-eighth ownership in the lease, and one-eighth interest in the profits resulting from the operation of the lease, without personal liability for any portion of the expenses; W. S. Copeland and F. M. Taylor, each three-eighths ownership in the lease and three-eighths in the profits, and each to be liable for one-half

the expenses, if any, over and above the earnings of the said lease. * * * Third. It is mutually understood that the profits of the lease, in which Charles H. Thomas and John F. Johnson have each one-eighth interest, are to be computed and divided in the following manner, viz.: When on the last day of any calendar month the total receipts from the lease after January 25th, 1898, shall exceed the total expenses of the lease after January 25th, 1898, to said last day of the month, the surplus receipts on hand shall be divided by check mailed on or before the tenth day of the succeeding month to the address of each party in interest, but at any time when such receipts do not exceed such expenses no division shall be made."

1. The chief dispute is over the method of ascertaining profits. The plaintiffs' position is that the contract means that the accounts shall be closed at the end of every month, and the loss, if any, at the end of the month, shall be borne by the defendants absolutely, without reference to the statement of accounts for the other months; that if the expenses for any month or series of consecutive months, are greater than the receipts for that month or series of months, neither the total receipts, nor the profits, of any other month or months, can be applied to the extinguishment of such excess expenses. In effect, plaintiffs say that the lease is divided into monthly rests or periods; that, for the purpose of ascertaining and distributing profits, the lease is divided into such periods or rests, each of which must stand on its own basis, without reference to any other period of the full term. Defendants, on the contrary, say that the contract, on its face, shows that in computing the profits the entire period during which the lease runs after January 25, 1898, must be taken into consideration, and, though the distribution is to be made on the last day of any calendar month after the date the contract becomes effective, provided any profits accrue during that month, nevertheless it was clearly the agreement of the parties that the method of ascertaining profits was by deducting the total expenses of operating the lease from the beginning up to the time when, if they existed, profits were to be di-

vided, from the total receipts for that entire period, and that the expressions in the lease, "total receipts from the lease after January 25th," and "total expenses of the lease after January 25th," can only mean, and were intended only to mean, that plaintiffs upon the final accounting were to receive their respective shares of the profits resulting from the operation of the lease for the full term. The first clause of the contract standing alone, in terms provides that plaintiffs are not to be personally liable for any part of the expenses incurred under the lease, but that defendants are to pay all of them. It is just as manifest that plaintiffs were to receive for their respective interests one-eighth only of the profits resulting from the operation of the lease, and the profits were to be what was left from the receipts after all expenses were deducted, and these profits were those resulting, not from the operation of the lease for some particular fraction of the term, but for the whole time it was to run. Such is the natural meaning of the language of this clause, but, if possible, this meaning becomes clearer from what is said in the third clause. Therein provision is made for the computation and division of profits, which are to be determined by subtracting on the last day of any calendar month, from the total receipts from the lease received after January 25, 1898, up to such last day of any month, the total expenses of the lease after January 25th up to such last day. This does not mean that the profits are to be reckoned by dividing the lease into monthly periods or rests, and by taking the total receipts of each month, and subtracting therefrom the total expenses of that month, wholly irrespective of the state of the account for other months, and distributing the surplus thus arrived at to the different interests. The contract means just what it says,—that though the time at which the computation and distribution of profits, if any, are made, is to be on the last day of any month, the amount to be distributed monthly is only what is left of the total receipts from the be-

ginning of the term of the lease up to that date, after there are subtracted from such receipts the total expenses of the lease incurred during the same period of time; and, since the total expenses of the lease from February to September exceeded by over $14,000 the total receipts for the same period of time, it was proper for the defendants to apply to the liquidation of such excess expenses the subsequent receipts until that excess was wiped out before distributing any profits. This construction does not violate that provision which imposes upon defendants the obligation to pay all expenses, and which relieves the plaintiffs from the payment of any portion, though the argument to the contrary at first blush may seem plausible,—that the withholding by defendants of profits until after all expenses are met is a practical requirement that plaintiffs shall pay a part of the expenses, all of which the defendants themselves agreed to pay. The fallacy of this argument is seen when it is recalled that, though plaintiffs were not to be personally liable for expenses, the receipts from sales of ore could be applied to expense account, and only profits are to be divided, and profits do not exist until after expenses are paid.

A construction should not be given to a contract that will result in oppression, if another construction can be reasonably made that will work justice. Let us illustrate: A case might well be supposed, under this very contract, that the managing lessees, during the first 17 of the 20 months they operated the mine, restricted their work to a thorough and systematic development and blocking out of ore, so as quickly to extract it during the closing months of the lease, and that in such preliminary operations they spent $100,000 without shipping a ton or receiving a dollar from sales of ore, and then, during the last three months, by rushing work and availing themselves of the antecedent work, they break down, ship, and market ore to the gross value of $200,000, at an actual outlay during those three

months of only $10,000. Every one familiar with mining knows that similar instances are not uncommon, and that such methods are legitimate and economical, and in accordance with scientific mining. But if the plaintiffs' construction of this contract is right, a great hardship would be inflicted upon the defendants, for the latter would be obliged to divide as profits $190,000, when $90,000 is the legitimate profit, for, as a matter of fact, the actual and legitimate expense of producing this ore began with the first day's work on the mine, and aggregated $110,000 instead of $10,000. The primary rule of construction of contracts is to make them speak the intention of the parties as gathered from the entire transaction. *Wyatt* v. *Irrigation Co.* 18 Colo. 298, 33 Pac. 144, 36 Am. St. Rep. 280; *McPhee* v. *Young,* 13 Colo. 80, 21 Pac. 1014; and *Mining Co.* v. *Tierney,* 5 Colo. 584. If this can be arrived at from the language employed, the court is restricted to that. If, however, there is any uncertainty about it, the interpretation which the parties themselves put upon the contract may be looked to. We have no doubt that the contract means just what defendants say, and, when the uncertainties that necessarily attend mining operations are considered, it is not reasonable to believe that the parties here made a contract that would work such an unconscionable result as the plaintiffs' contention would lead to, and we will not so hold unless the language compels it. If, however, there was doubt as to the meaning of the language used in this contract, the interpretation put upon it by the plaintiffs themselves is the one that defendants contend for. Every month during the term of the lease, defendants, as required by its provisions, and as already stated, rendered to plaintiffs an itemized statement of account; and during the months when profits were realized these statements showed that they were computed on the basis of the total receipts of the lease from the beginning of the term to the last day of the particular month, and then by deducting therefrom all expenses incurred

up to the day of reckoning. Checks for the shares of the profits thus computed were received and cashed by plaintiffs, and no objections made by them to defendants,—either to the accounts as rendered or to the inadequacy of the profits,—until several months after the lease was surrendered.

It may be that the separate defenses of the answer in which these facts are alleged do not technically constitute good pleas of account stated or accord and satisfaction; but, if so, the admission of the evidence establishing these facts was not objected to on that ground. But whether the answer shows an account stated, to which no reasonable objection was seasonably made by the plaintiffs, or whether an accord and satisfaction is well pleaded, is not important under the facts of this case. It is entirely clear that plaintiffs knew the construction which defendants put upon the contract when these statements, covering a period of nearly two years, were received by them, and they never objected thereto until after a lapse of an unreasonable time. As a matter of law, it would seem that plaintiffs ought not now to be heard to insist upon another meaning. Their long silence is not justified by showing (and this is their only excuse) that under advice of counsel they deferred objection until after the termination of the lease, because they feared that, if sooner made, litigation would result, or the work stop, or the lease be thrown up. Fair dealing required that their objection be made within a reasonable time after the accounts were rendered, so that plaintiffs, if such a construction as plaintiffs now insist on was to govern, might elect to stop work which the agreement permitted. If it be conceded that the answer defectively pleads these two defenses, still the fact is indisputable that by their conduct plaintiffs put upon this contract the same construction which defendants did, and which is the one that we have said it bears, and the one in accordance with which the defendants distributed the profits. They cannot now assume a different attitude.

2. As to the cross-errors assigned by plaintiffs, it is to be said that it is uncertain whether they have been assigned on the record as our statute requires. They are, however, easily disposed of on their merits. The payments to the Big Four Company were properly chargeable to expense account. There is no contention that the work under the lease was unskillfully or extravagantly conducted, or that the contract made with that company for the privilege of working the Fanny Rawlings claim was not a suitable and reasonable one. Indeed, we are warranted in saying that operating the Fanny Rawlings mine through the Big Four workings was economical and proper, and in accordance with good mining. As the amount paid for this privilege is not objected to as excessive, but only on the ground that it is not of such character as to be included as a part of the expense, we are of opinion that the district court was right in declaring it a proper charge to be taken from the receipts before declaring profits.

3. The royalty to be paid to the lessor was provided for in the original lease. Plaintiffs claim that this item should be included in, and that it constitutes a part of, the expenses of operation to be paid by the defendants, and in no event to be a charge against them. It is clear, however, that the receipts contemplated by the lease, out of which profits were to be paid, mean only such part of the receipts as, by the very terms of the original lease, belonged to the lessees, and these were the receipts left after the royalty was paid. The royalty reserved for the lessor never belonged to the lessees. It was a primary charge on the receipts, and was the sole property of the lessor, as its consideration for the lease. It cannot be said that royalty constitutes any part of the expenses of operating the lease.

It follows that the findings and judgment of the court as to the items relating to the Big Four Company and the royalty are right, and as to the first item concerning profits, wrong. Plaintiffs' assignment of cross-errors is not well

taken, and the judgment of the trial court with reference to them is affirmed. On defendants' appeal the judgment is reversed, and the cause remanded, with instructions to dismiss the action.

Reversed.

REBECCA GOLD MINING CO., LIMITED, v. CALEB F. BRYANT.

(31 Colorado 119; 71 Pac. 1110. Supreme Court. January 12, 1903.)

The cancellation of a land office entry does not invalidate the location of the claim, nor render the ground open to relocation.

Location valid as to third parties. Where a claim apparently junior overlaps another claim apparently senior, but the senior disclaims title to the overlap, the owners of a third location cannot contest the validity of the title upon such points as the senior claim might have asserted.

Erroneous exclusion of ground by land office. Where patent issued to the C. O. D. lode excluding an overlap claimed by the Rebecca lode whereupon such overlap was entered by the Rebecca lode on its own application for patent but the entry as to such overlap was without notice and erroneously cancelled and the patent issued excluding the overlap: *Held*, that such wrongful action of the land office did not divest the Rebecca title and that it could claim the ground by virtue of its receiver's receipt.

Appeal from District Court, El Paso County.

In application for patent, applicant is not bound by surveyor's error in excluding ground where he has the same corrected as soon as discovered. The deputy U. S. mineral surveyor is not the agent of the applicant. *Basin Co.* v. *White*, 19 M. R. 690.

Land office decisions entitled to respect but not binding on the court. *Lavagnino* v. *Uhlig*, 22 M. R. 610.

A judgment of the land office cannot be collaterally attacked. *Gurney* v. *Brown*, 32 Colo. 472; 77 Pac. 357.

A suspension of an entry is not the equivalent of the cancellation of a receiver's receipt. *Id.*

Status of land where applicant is compelled to relinquish part of his ground under land office rulings. *Id.*

The rejection by the land office of an application for patent does not destroy the original title by location. *Peoria Co.* v. *Turner*, 20 Colo. App. 474; 79 Pac. 915.

Where the land office has the statutory right to make rules and regulations (concerning forest reserves) and to decide questions arising under them the courts will not invade their jurisdiction and anticipate their decision. *Cosmos Co.* v. *Gray Eagle Co.* 190 U. S. 301. *U. S.* v. *Hitchcock*, 190 U. S. 316.

Action by the Rebecca Gold Mining Company, Limited, against Caleb F. Bryant. From a judgment in favor of defendant, plaintiff appeals. Reversed.

CARPENTER & MCBIRD, for appellant.

GUNNELL, CHINN & MILLER, for appellee.

Chief Justice CAMPBELL delivered the opinion of the court.

This is an action in support of an adverse claim. A triangular strip of ground in the Cripple Creek mining district was covered by three separate mining locations—the C. O. D., made in 1891; the Rebecca, in 1892; the Helen B., in 1898. The controversy here is between the owners of the Rebecca and Helen B. The evidence is practically harmonious, the case having been tried upon uncontradicted oral testimony and an agreed statement of facts, and without strict regard to the issues made by the pleadings. The material facts are:

The ground in controversy was included within the C. O. D. location and was described in the location certificate. When application for a patent therefor was filed, which was after the Rebecca location was made, the conflicting territory was expressly excluded therefrom by the applicants, and afterwards by the land department, from the patent which was issued in 1893. It clearly appears that this strip was by mistake included within the C. O. D. location, and that its owners never at any time made any claim to it. In making application for a patent to the Rebecca lode in 1895, there is apparently some uncertainty upon the part of its owners as to their attitude with respect to this conflicting territory. In one of the papers constituting the application for a patent for the Rebecca, it seems, by mistake of the applicants, to have been excluded. They corrected the error by including

it in amended published papers, and when the final proof was made, the officers of the department described it in the final certificate of purchase, or receiver's receipt, acknowledging the payment of the purchase price.

Afterwards, and before patent, and because of the fact of this first erroneous exclusion from one of the patent papers, the commissioner of the land office, of his own motion, without notice to the owners of the Rebecca, cancelled or changed the records of his office, or caused the same to be done by excluding from the final certificate of entry this conflicting territory, and when the patent was issued for the Rebecca in August, 1895, it did not contain the same, although the previously issued C. O. D. patent, as well as that application for entry, did not cover it.

After patents had been obtained for the Rebecca and the C. O. D. they were recorded, and the two mines conveyed to the appellant mining company, which has, ever since that time, been continuously in possession and working them as producing mines. In August, 1898, from an inspection of these patents by the plaintiff (appellee here), he discovered that the ground, which he subsequently located as the Helen B., though included in the location certificates of both the earlier locations, was excluded from the patents, and he thereupon proceeded to locate the same as the Helen B. claim, and afterwards perfected his location in accordance with the statutes, and his title is good, if at the time of his location the territory was unappropriated public domain.

When the appellee sought to obtain a patent for the Helen B., the commissioner of the land office refused to consider his proceeding as an application for that purpose, but remitted him to his rights under the statute in case an application for a patent to the ground was made by other claimants. The various rulings of the department are not altogether consistent, but its final decision with respect to the Rebecca lode was that since, in one of the papers constituting application for a

patent therefor, the territory here in conflict was distinctly claimed, and at that time the only apparent adverse interest thereto arose out of its previous location as a part of the C. O. D., and the owners of the latter had never made any claim thereto, but had excluded it in their entry, and the department had also excluded it from the patent; the change by the commissioner of the certificate of purchase of the Rebecca was unauthorized, and the conflicting territory should have been included in the Rebecca patent. But since appellee, as the owner of the Helen B. location, claimed rights in the same property, the owners of the Rebecca were required to readvertise and make application for a patent for their property as if no previous application had been made. And in this connection it is pertinent to remark that the mere cancellation of the entry does not render the ground open to relocation. *Beals* v. *Cone,* 27 Colo. 473.

When, therefore, in pursuance of such directions, appellant proceeded to make application for a patent for the Rebecca lode including the strip in controversy, the appellee filed his adverse claim and brought this suit in its support.

A number of questions have been argued by counsel which, in the view we take of the case, it is not important to determine. The chief reliance of appellee seems to be that because the disputed tract was covered by the C. O. D., the same being the first location, the locators of the Rebecca claim, being subsequent in time, acquired no right whatever to the conflicting territory; that though the owners of the C. O. D. expressly disclaimed any right to this ground when they applied for a patent and, in fact, at all times, this did not inure to the Rebecca owners so as to attach the alleged abandoned ground to the Rebecca claim; but before the Rebecca owners could acquire any right thereto, it was necessary for them to proceed under the statute to relocate the same as an abandoned claim by filing a new or amended certificate of location, which was not done. The principal authorities upon which

they rely are *Belk* v. *Meagher,* 104 U. S. 279; *Gwillim* v. *Donnellan,* 115 U. S. 45; *Oscamp* v. *Crystal River M. Co.* 58 Fed. 293 (7 C. C. A. 233), and 1 Lindley on Mines, § 363.

It is to be observed that the rule there announced was applied in cases involving the two original overlapping locations, and not to a controversy between the junior of the two original locators and some third party, whose rights as a relocator, if any, afterwards arose. At all events, we think that, under the facts of this case, the doctrine above contended for does not apply and that there is no ruling in any of those cases inconsistent with the conclusion we have reached as to the validity of the Rebecca lode. When the ground was given up by the C. O. D., its owners had the right to agree with the owners of the Rebecca, which apparently they did, to relinquish the ground claimed by both locations, so that the junior location might acquire title to it, and if the latter, before intervening rights accrued, took such steps under the public land laws and the rules of the land department as entitled him to a patent therefor, and on final proof received a receiver's receipt for the same, a third party cannot gain a superior right by making a location upon it as unappropriated public domain after the issuance of such certificate of purchase. At least, this is true unless such certificate is lawfully set aside by the officers of the government, even though, as between the owners of the two original locations, the owner of the junior one, by failing to comply with some statute or rule of the department, might not prevail.

The Rebecca owners, on the showing made in this record, were entitled to a patent for the land in conflict when the land officers gave them the receiver's receipt describing it, and it is only because the disputed ground was excluded from the patent (improperly, as we hold) that the owner of the Helen B. can claim that it was abandoned by them, hence open to entry as a part of the public domain. Let us examine this contention.

We are clearly of the opinion that the action of the commissioner of the land office in changing the receiver's receipt so as to exclude therefrom the territory in conflict was void. No notice was given by the land department, and none received by the owners of the Rebecca, of this change, and although the patent as issued to them contained no description of the excluded ground, nevertheless the record shows that this omission was not known to the owners of the Rebecca until about the time the appellee attempted to make his location, and they were then in actual possession of the premises, working them under claim of right as part of the Rebecca lode described in their final receipt.

It also clearly appears that this disputed territory has been in the possession of, and mining operations therein carried on by, the defendant and its grantors from the time of the location of the Rebecca, and that when appellee attempted to make his location he was aware of that fact, was warned by them that they claimed the ground, and requested not to enter upon it.

We think the general rule is, as stated in *Swigart* v. *Walker,* 49 Kan. 100, that the commissioner of the general land office has, for good cause shown, authority to cancel a final receiver's receipt and set aside the entry any time before patent issues. It is, however, equally well settled, as shown in the case of *Cornelius* v. *Kessel,* 128 U. S. 456, that the supervision possessed by the commissioner is not unlimited or arbitrary, but can only be exerted on a proper showing made, and with notice to the applicant whose entry is attempted to be vacated. There is no claim here that this entry was made upon false testimony, or without authority of law. On the other hand, the records of the land office show that the disputed strip was erroneously and by mistake included within the C. O. D. location by the owners of the latter and that they never made any claim to the same, and intentionally excluded it in their application for a patent. It was evidently in accordance with

an arrangement between them and the owners of the Rebecca that the former made the exclusion, and when the owners of the Rebecca applied for, and received, their patent, the ground was unappropriated public domain. Under these facts, as against all persons except the government, the Rebecca owners were then entitled to possession, and upon payment of the purchase price and issuance of the receiver's receipt their right to a patent became vested. That receipt vested in those to whom it was issued the right to a patent which has not yet been, and cannot now, on the facts before us, be divested.

The subsequent action of the land department in assuming to cancel this entry to the extent of the ground in conflict was wholly unauthorized and void, as the commissioner of the land office himself subsequently ruled. *Del Monte M. Co.* v. *Last Chance M. Co.* 171 U. S. 54, has been cited by the appellee as sustaining his contention, but we find nothing in that decision to justify it, and, as already stated, we do not think that this case comes within the doctrine of *Belk* v. *Meagher, supra,* as clearly appears from the comments upon that decision made by Justice Brewer in his opinion in the Del Monte case.

We are of opinion that the receiver's receipt for the Rebecca, which the appellant holds, has not been lawfully cancelled, and that in this proceeding its validity has not been impeached. The judgment of the district court being in conflict with this view, it is reversed and the cause remanded.

Reversed.

LOWTHER OIL CO. v. JAMES M. GUFFEY ET AL.

(52 West Virginia 88; 43 S. E. 101. Supreme Court of Appeals. January 14, 1903.)

Lease from year to year Where a lease for oil and gas allows the lessee two years to sink and then provides for further time on payment in advance of an annual rent such lease is a lease from year to year until a well is completed.

Reasonable time to lie idle, paying rental. A court of equity would relieve against a clause in a lease allowing an oil and gas lessee to continue idle indefinitely on payment of a nominal rent. But not where he has only been waiting a reasonable time to ascertain the probability of success in sinking.

Appeal from Circuit Court, Calhoun County; WARREN MILLER, Judge.

Where an oil lessee agreed to obtain a partition, held that his lease was forfeited by delay to apply for the partition. *Emery* v. *League*, 31 Tex. Civ. App. 474; 72 S. W. 603.

Where lessee agreed that if his first well paid he would drill sufficient wells to protect the land and he failed so to do; *Held*, a case without adequate relief at law and that the lease should be cancelled as to the undrilled ground. *Coffinberry* v. *Sun Oil Co.* 68 Ohio 488; 67 N. E. 1069.

Obligations of lessee holding leases on adjoining tracts from different lessors. *Colgan* v. *Forest Co.* 20 M. R. 338.

An oil lease with royalties reserved as the consideration but no covenant to drill, and terminable at lessee's pleasure, is unconscionable and should not be enforced. *Federal Co.* v. *Western Co.* 22 M. R. 25.

A lease not binding the lessee to any work or outlay construed as a revocable license and must yield to a later lease based on consideration. *Martel* v. *Jennings' Syndicate*, 114 La. 903; 38 So. 253.

Construction of contract where the intended consumer was to pay the entire cost of the well if gas were found and half the cost if gas not found. A temporary connection with the well to test its capacity held no acceptance of it as a producing well. *Neely* v. *Rochester Co.* 207 Pa. 388; 56 Atl. 942.

After a gas well is operated the lessee becomes liable and remains liable for the rent until it is paid or he gives actual notice of abandonment. *Wilson* v. *Philadelphia Co.* 210 Pa. 484; 60 Atl. 149.

Bill by the Lowther Oil Company against James M. Guffey and others. Decree for plaintiff, and defendants appeal. Reversed.

EDWARD A. BRANNON and R. L. BLAND, for appellants.

JOHN M. HAMILTON and T. P. JACOBS, for appellee.

DENT, President. James M. Guffey appeals from a decree of the circuit court of Calhoun county cancelling a certain oil and gas lease executed to him by Ella Yoak and her husband in a certain chancery suit wherein appellant was defendant and the Lowther Oil Company was plaintiff; and the lease filed with the said bill from Ella and A. T. Yoak to James M. Guffey, and referred to as "Exhibit B," is in the words and figures following, to wit:

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, Ella Yoak and Agnew Yoak, of Athens county, state of Ohio, first party, hereby grant unto James M. Guffey, of Pittsburg, Pennsylvania, second party, their heirs and assigns, all the oil and gas in and under the following described premises, together with the right of ingress and egress at all times for the purpose of drilling and operating for oil, gas, or water, and to conduct all operations and lay all pipes necessary for the production and transportation of oil, gas, or water taken from said premises, reserving, however, to first party the equal one-eighth (⅛) part of all oil produced and saved from said premises, to be delivered in the pipe line to the credit of the first party free of charge: All that certain lot of land situate in the district of Center, county of Calhoun, in the state of West Virginia, bounded and described as follows, to wit: North by lands of Taylor heirs, east by lands of Holbert, west by lands of James Metz, south by lands of Wilson Richards; containing seventy-five acres, more or less.

"To have and to hold the above premises unto the parties of the second part, their heirs and assigns, on the following conditions: If gas only is found, second party agrees to pay two hundred dollars each year in advance for the product of each well while the same is being used off the premises. Whenever first party shall request it, second party shall bury all oil and gas lines, and pay all damage.

done to growing crops by reason of burying and removing said pipe lines. No well shall be drilled nearer than 500 feet to the house or barn on said premises. In case no well is completed within two years from this date, then this grant shall immediately become null and void as to both parties: provided, that second party may prevent such forfeiture from year to year by paying to the first party annually in advance eighteen and 75/100 dollars, at her residence, until such well is completed.

"The second party shall have the right to use sufficient gas, oil, or water to run all necessary machinery for operating said well, and also the right to remove all their property at any time. It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, and assigns.

"In witness whereof the parties hereto have hereunto set their hands and seals the 13th day of April, A. D. 1895. Ella Yoak. [Seal.] A. T. Yoak. [Seal.] James M. Guffey. [Seal.]

"Signed, sealed, and delivered in the presence of H. C. Sherard, J. F. Kimpton."

Appellant did not drill a well on the land, but paid up the commutation money until the 13th day of April, 1901. In March, 1901, he took possession, and began drilling, and tendered his lessors the commutation money of $18.75, and a further sum, increasing the aggregate to $75, if they would permit him to continue operations without molestation. They having executed a second lease to the Lowther Oil Company, the plaintiff, on the 3d day of October, 1900, subject to appellant's lease, declined appellant's tender. Thereupon the plaintiff instituted this suit, and succeeded in having appellant's lease held void, and all operations thereunder perpetually enjoined. This whole case, therefore, depends on the validity of appellant's lease. An examination of it shows that it is a lease or grant of all the oil and gas under a certain tract of land in consideration of $1 in hand paid and the reservation of one-eighth of the oil when produced and $200 annual gas rental for each well, subject to a forfeiture clause in these words: "In case no well is completed within two years from this date, then this grant shall immediately

become null and void as to both parties: provided, that second party may prevent such forfeiture from year to year by paying to the first annually in advance eighteen and 75-100 dollars, at her residence, until such well is completed."

This latter clause converts what would be otherwise a perpetual grant into a lease from year to year, at the option of the lessee, until oil and gas are produced, and then to continue so long as they are produced in paying quantities. This lease is very different from the one passed on in the case of *Eclipse Oil Co.* v. *South Penn Oil Co.* 47 W. Va. 84, 34 S. E. 923. While $1 is a small consideration, yet it is a valuable consideration, and the court cannot say that it was inadequate under the circumstances, as the lessors did not consider it so. It was only intended to hold the grant for two years, and after that time a further consideration to prevent forfeiture was provided. During the two years the lessors did not object to the adequacy of the consideration, and it is too late to do so now. Such consideration for a similar lease has been held sufficient. *Oil Co.* v. *Snyder,* 45 C. C. A. 604, 106 Fed. 764; *Brown* v. *Oil Co.* 21 Ohio Cir. Ct. R. 117; *McMillan* v. *Philadelphia Co.* 159 Pa. 142, 28 Atl. 220; Donahue, Petroleum & Gas, 156. Inadequacy of consideration is not alone sufficient to invalidate a lease, although where it is grossly inadequate it is regarded as proof of fraud. 6 Am. & Eng. Enc. Law (2d Ed.) 696-700. There is no pretense of fraud in this case. After the expiration of two years the sum of $18.75 was agreed upon between the parties as an adequate consideration to prevent forfeiture, if paid in advance from year to year until a well was completed. The court cannot say that it was not. It was paid promptly, and received by the lessors, and no forfeiture of the lease could possibly occur.

The question of importance in this case is whether the lessee had the option to continue the lease from year to year by the payment annually of the nonforfeiture sum. This is

the way in which the lease reads. The manacles were forged by the lessors themselves with their eyes open, and the court cannot remove them unless fraud can be shown, or the contract is so unfair and uneven as to render its enforcement equivalent to the perpetration of fraud upon the lessors. It is claimed that this is a case of such character, because the lessee, by the prompt payment of the nonforfeiture sum, could perpetually prevent the development of the land for oil and gas. It is not, however, probable that he would do so, and he is already actively engaged in drilling. If it could be shown that such was his purpose, it would amount to a fraud, which equity might relieve against, for the reason that the primary object of the lease is the development of the land and production of oil royalties and gas rentals, and equity will not tolerate a fraudulent delay in operation. No such delay has occurred here, but the lessee has only waited until he could ascertain that there was a strong probability of obtaining oil or gas before expending the large sums necessary in the proper development of the land. This seems to have been the object of the provision in permitting him to postpone the development from year to year. The lessors have become impatient at a delay to which they consented, and which has not been shown to be unreasonable. Impatience on their part is no ground for the interference of a court of equity.

The plaintiff's lease was taken with full knowledge of and subject to the appellant's lease, and hence it has no rights thereunder until appellant's lease is forfeited. *Scrupp* v. *Nukill,* 34 W. Va. 375, 12 S. E. 501; *Nukill* v. *Myers,* 36 W. Va. 639, 15 S. E. 151; *Gas Co.* v. *Jennings* (C. C.) 84 Fed. 839. As appellant's lease is not forfeited, or capable of being forfeited at the present time, the circuit court erred in holding it void.

The decree complained of is reversed, the injunction dissolved and the bill dismissed.

LYMAN M. HARLEY ET AL. v. MONTANA ORE PURCHASING CO. ET AL.

(27 Montana 388; 71 Pac. 407. Supreme Court. January 26, 1903.)

[1]**No injunction against prospect pits.** An entry upon a mining claim to search and sink for lodes, sinking shafts through gravel and taking away no ore, even if an unlawful trespass is not a destruction of the estate and is not cause for an injunction.

Posting location notice is not a violation of an injunction against mining.

A defendant in contempt cannot be punished by refusing to allow him to put in his evidence where he is a party to a cause on trial. That would be to deny to him due process of law.

Appeal from District Court, Silver Bow County; WM. CLANCY, Judge.

Suit by Lyman M. Harley and another against the Montana Ore Purchasing Company and others. From an order granting a temporary injunction, defendants appeal. Reversed.

CLAYBERG & GUNN and GEO. M. BORQUIN, for appellants.

FORBIS & EVANS and T. BAILEY LEE, for respondents.

BRANTLY, C. J. This action was brought to obtain a judgment for damages alleged to have been committed by the defendants upon the "Washington Placer," situate in Silver Bow county. It is alleged, in substance, that the plaintiffs are, and were at the times mentioned in the complaint, the owners in possession and entitled to the possession of the said premises, and that the defendants, with a large number of men, wrongfully and unlawfully entered thereon during the

[1] *St. Louis Co.* v. *Montana Co.* 17 M. R. 658.

month of December, 1899, and January, 1900, and made excavations and sunk shafts therein, and by these acts, and by scattering the débris from the said excavations so made upon the surface of the land, damaged the plaintiffs in the sum of $500.

In a second cause of action, relief is sought by way of injunction *pendente lite,* upon a reiteration of the foregoing allegations, with the additional averment that the defendants were at the time the action was commenced continuing the acts of trespass complained of, thus destroying the substance of plaintiffs' estate. Upon the filing of the complaint, supported by an affidavit of one Meyer Genzberger, the court issued an order requiring the defendants to appear and show cause why an injunction should not issue to restrain the acts complained of until final hearing. The defendants were by the order in the meantime restrained from pursuing their operations until the hearing under the order to show cause. The action was commenced on January 5, 1900. The hearing under the order was fixed for January 13, 1900.

Various proceedings were had in the cause after the last-mentioned date until March 30, 1900, when the order to show cause finally came on for hearing. Detailed notice of these proceedings is not now pertinent. A full statement of them may be found by reference to *State* v. *Clancy,* 24 Mont. 359, 61 Pac. 987. In the meantime the defendant George Gemmel appeared and filed his answer, controverting the allegations of the complaint, except as to the doing of the acts complained of, and set up matters by way of affirmative defense attacking the validity of plaintiffs' title. At the hearing the plaintiffs introduced evidence tending to show that the ground in controversy had been located by their predecessors in interest as a gold placer, that the same had been entered by them for patent under the mineral laws of the United States, and that they held a receiver's receipt showing them to be entitled to a patent therefor. Other evidence introduced tended

to show that the ground was not actually occupied until the defendant Gemmel entered thereon some time in December, 1899, with his employees, his codefendants, to explore the ground in order to discover quartz lodes believed by him to exist therein, and that at the commencement of the action he and his codefendants were engaged in sinking three different shafts through the surface deposits of clay and gravel in order to accomplish their purpose; depositing the débris therefrom upon the surface immediately about these shafts. It appeared affirmatively from this evidence that no ore of value had been found, and that nothing except an assay sample had been taken from the premises. When the plaintiffs rested, the defendant Gemmel offered evidence; but upon objection by plaintiffs his evidence was excluded, and he was denied a hearing, on the ground that he had theretofore been adjudged guilty of a contempt, in that he had, after the service of the restraining order issued at the commencement of the action, gone upon the premises in violation thereof, and posted notices of a discovery of quartz lodes therein, with the intention of locating them. Thereupon the court ordered the injunction to issue, restraining the defendants from making further excavations upon the premises, and also from again entering thereon for any purpose until final hearing. This action of the court was erroneous, for two reasons:

1. There is nothing in the evidence adduced by the plaintiffs to warrant the issuance of an injunction. At best, it does not disclose anything further than an unlawful entry upon plaintiffs' premises, for which adequate redress could be had under the action for damages. It does not appear that the defendant Gemmel is insolvent, or that his operations, as conducted by him upon the premises, tend in any way to destroy or materially injure the substance of the estate. There is nothing in the facts presented to distinguish this case from that of *King* v. *Mullins* (decided at the present term) 71 Pac. 155, and we think that case conclusive of this.

2. The defendant was entitled to a hearing, no matter whether he had theretofore violated the restraining order or not. We do not think that the mere posting of notices upon the ground was a violation of the order. Until the defendant was adjudged to have no right upon the premises, his presence there was not a contempt; nor was anything he did there a violation of the order, so long as he refrained from prosecuting his work of excavation, which was the matter with reference to which the order was made. But conceding that this act constituted a contempt, there is no authority in law for the punishment inflicted, nor for the mode by which it was done. It was clearly pointed out in *State* v. *Clancy, supra,* in which the contempt proceeding was reviewed by this court, that our statute directs what procedure must be pursued in cases of constructive contempt, such as this was, if a contempt at all; and the conclusion was announced that this procedure must be observed, or the judgment rendered is void. So there is no authority of law for inflicting the punishment which the court inflicted in this case. The statute (Code Civ. Proc. § 2179) provides what penalties may be inflicted, and this, we think, is exclusive. In a given case the penalty may carry with it, as an incident, the postponement of a hearing while the party is undergoing his punishment for his contumacious conduct; but a refusal to hear finally, as was the case here, even though there be no fault in the procedure up to the time of judgment, is subversive of one of our dearest and most sacred constitutional rights.

"The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action, and to render decrees without any hearing whatever, is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends." *Hovey v. Elliott,* 167 U. S. 409.

This language was quoted with approval by this court in *State* v. *Clancy, supra,* and, we think, is peculiarly applicable to the facts in the case now under consideration.

The order complained of is reversed, and the cause remanded.

Reversed and remanded.

MILBURN and HOLLOWAY, JJ., concur.

MONTANA ORE PURCHASING CO. ET AL. v. BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING CO.

(27 Montana 410; 71 Pac. 403. Supreme Court. Feb. 6, 1903.)

Further developments after final injunction in apex case. Plaintiff had secured a judgment giving it extralateral rights in certain ground. Afterwards it became a question whether certain newly opened ground was covered by the decree. *Held*, that contempt under the original decree would raise the issue and that it was error to file a new bill to quiet title.

Appeal from District Court, Silver Bow County; WM. CLANCY, Judge.

Suit by the Montana Ore Purchasing Company and another against the Boston & Montana Consolidated Copper & Silver Mining Company. From an order granting a temporary injunction, defendant appeals. Reversed.

FORBIS & EVANS, for appellant.

J. M. DENNY and MCHATTON & COTTER, for respondents.

BRANTLY, C. J. Appeal from an order granting a temporary injunction. The action was brought by the plaintiffs to obtain a decree quieting title to certain ore bodies beneath the surface of the Pennsylvania (patented) lode claim, situate in Silver Bow county. The plaintiffs allege that they are the owners, in possession and entitled to the possession, of portions of the Rarus and Johnstown (patented) lode claims, immediately to the north of the Pennsylvania claim; that the end lines of these claims are parallel; that there are

A claim of title by reason of an apex in other ground is one which should have been set up in the original action. The title has become *res adjudicata* in a supplemental suit. *Hanley* v. *Beatty*, 117 Fed. 59.

certain veins having their apices therein, and passing through the end lines thereof; that these veins also pass through the portions of said claims owned by the plaintiffs; that they so far depart from the perpendicular in their descent into the earth that they pass beyond the south side lines of the Rarus and Johnstown claims, and enter beneath the surface of the Pennsylvania claim; that, by virtue of their ownership of the apices of the veins within their boundaries, the plaintiffs are entitled to extralateral rights upon the vein between planes passing through the end lines of the portions owned by them; and that the defendants in January, 1900, wrongfully and without the consent of the plaintiffs, entered upon certain portions of said vein beneath the Pennsylvania claim, and extracted and removed therefrom large quantities of valuable ore. The complaint then proceeds:

"Plaintiffs further allege that heretofore the above-named plaintiff, Montana Ore Purchasing Company, brought an action in the district court of the Second judicial district of the state of Montana, which action is numbered 7,337 of the files of said court, against the above-named defendant, for the purpose of establishing its right to the premises hereinbefore described and owned by it, and to all of the before-mentioned veins, leads, lodes, ledges, and mineral deposits throughout their entire depth within the planes hereinbefore described; that said defendant appeared and answered therein, and that thereafter said cause was duly and regularly tried by said court; and that said court on or about the 28th day of December, 1899, made and entered its findings of fact and conclusions of law therein in favor of said plaintiff, and thereafter, and on or about the 14th day of February, 1900, duly made and entered its judgment and decree therein adjudging said plaintiff to be the owner, in possession and entitled to the possession, of all of the same, and decreeing that the defendant had no right thereto, and that its claim was without any foundation, and entering a permanent injunction against said defendant, forever enjoining it from asserting any claim thereto, or interfering with the right or possession of the said plaintiff therein. And plaintiffs allege that the portion of said vein or veins, lead, lode, or mineral deposit, upon which the defendant has entered as aforesaid, are a part of and belong to the vein or veins,

leads, lodes, ledges, and mineral deposits which in the action aforesaid were adjudged to belong to the plaintiff therein."

It is further alleged that notwithstanding their ownership of said veins and ore bodies, and notwithstanding said decree, the defendant has continued and still continues to claim some title or interest in the said veins, and that such claim is without right; that the plaintiffs cannot have their title determined by one or more actions at law; but that, as development of the mine progresses, it will be necessary to bring many actions, owing to claims, which defendant will set up, that the successive ore bodies discovered are not portions of the veins and ledges adjudged to belong to plaintiffs. The complaint concludes with a prayer that the plaintiffs' title to said ore bodies be quieted, and that the defendant, and all persons claiming or to claim through or under it, be forever enjoined from asserting any right or title thereto. In a second cause of action the foregoing allegations are repeated, with an additional averment that the defendant is continuing its trespasses upon the property, thus destroying the estate; the purpose of this cause of action being to obtain an injunction to preserve the property pending litigation. Upon the filing of the complaint, supported by the affidavit of one of the engineers of the plaintiff, an order was issued requiring defendant to show cause why an injunction should not issue.

The defendant having filed its answer, a hearing was had upon affidavits and oral evidence. On the part of plaintiffs the effort was made to show that the ores in controversy were within the terms of the decree referred to in the complaint. The defendant endeavored to show that they were not within the issues in that case, and therefore the ownership of them was not adjudicated in the decree. The decree referred to was rendered in *Montana Ore Purchasing Co.* v. *Boston & M. Cons. M. Co.* 27 Mont. 288, 70 Pac. 1114. The hearing was had upon this issue, and the order was made upon the theory

that the evidence sustained the contention of the plaintiffs. It is upon this theory, also, that the plaintiffs maintain in this court that the order was properly made, and should be affirmed.

It is urged by the defendant (and properly, we think) that the complaint does not state a case warranting the issuance of an injunction. If, it argues, it be a fact that the ore bodies in controversy were decreed in that action to belong to the plaintiffs, then there is no reason why the district court should, immediately or soon after entering its decree, entertain another suit to quiet the title to the same property against claims made by the same defendant, instead of enforcing the decree already rendered with respect thereto. The decree upon which the plaintiffs predicate their claims was entered on February 14, 1900. The complaint in this case was filed on April 13, 1901. The order was made on June 22, 1901. If the facts be as they are alleged by plaintiffs, then the defendant has no title to or interest in the matter involved; and this action amounts to nothing more than an attempt to obtain an injunction to restrain the defendant from violating an injunction already obtained, perpetually enjoining it from asserting any adverse claim to the subject of the litigation. The way is open to the plaintiffs to enforce summarily the decree by contempt proceedings, and to enforce it effectually; otherwise another suit will be necessary to enforce the decree obtained at the end of the present controversy, and so on indefinitely. There must be an end of litigation over the same subject-matter between the same parties somewhere and at some time, whereupon the parties must be left to the summary enforcement of their rights as declared by the courts under proper process. It is true, the decree in question was obtained in favor of the Montana Ore Purchasing Company, only one of the plaintiffs in this case. The other plaintiff was not a party to it, it seems, and it does not appear what its interest in the property is; but whether

it be an interest in the property which existed at the time the judgment was rendered, or one that has arisen since the date of it, the result is the same. Both plaintiffs claim the benefit of the decree, and base their claim to the injunction upon an alleged violation of it. Their rights on this appeal must stand or fall by the decree. If the ownership of the ore bodies in controversy was not adjudicated in the decree of February, 1900, then the decree, and the terms of it, are matters entirely immaterial to this controversy. If they were so included, then the plaintiffs have a speedy, complete, and adequate remedy to enforce their rights by contempt proceedings, but no right to an injunction.

The order is reversed.

Reversed.

MILBURN and HOLLOWAY, JJ., concur.

[1]EMPIRE STATE-IDAHO MINING & DEVELOPING CO. v. BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO.

(121 Federal 973. Circuit Court of Appeals. Ninth Circuit. Feb. 16, 1903.)

Where, upon cross-writs of error, a portion of a judgment is affirmed and a portion reversed, the result is in effect, to reverse the entire judgment and remand the cause for a new trial, and no part of such judgment can be pleaded as an adjudication in bar of another suit.

Bill to quiet title while injunction suit pending. The pendency of a suit to enjoin the removal of ore from a mining claim by defendant as ancillary to an action of ejectment to recover possession of the part of the claim from which it was alleged that defendant was taking ore, is not a bar to a suit subsequently commenced by the same complainant to quiet its title to its entire claim, including extralateral rights not in controversy in the prior action.

The possession of the surface of a lode mining claim is the possession of the lode to the full extent of the extralateral right of the owner of the claim.

Segment of vein cut off by prior apex title. The extralateral right of the owner of a lode mining claim extends to a portion of the lode between his end-line planes produced, although it is completely severed from that portion lying within the boundaries of the claim by the extralateral right of the owner of an older claim located on the same lode, whose end-line planes extended intersect both those of the newer claims, and his possession of the surface of his claim is possession of such detached portion of the lode.

Possession not negatived by averment of trespass. A bill by the owner of a lode mining claim to quiet his title to his claim, including that portion of the lode within his extralateral rights, which alleges possession of the claim by complainant, does not negative such allegation as to a portion of the lode within such extralateral right, and show possession thereof in defendant, because it alleges a tres-

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[1]Followed as *res adjudicata* in suit to quiet title between same parties. 131 Fed. 591.

Bill which alleges that defendants are removing oil from the premises, admits defendant's possession, and equity has no jurisdiction to quiet title. *California Co.* v. *Miller*, 96 Fed. 12.

See note to *Montana Co.* v. *Boston Co.* 22 M. R. 471.

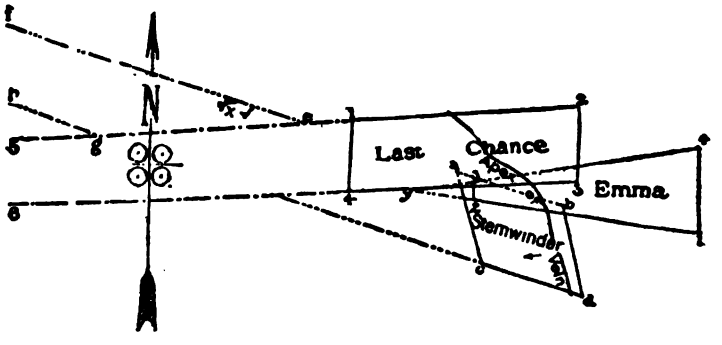
pass thereon, and the removal of ore therefrom by defendant, and prays for an injunction.

Remedy by ejectment inadequate. Where defendant owned a number of mining claims located on the same lode as the claim of complainant, under which it claimed extralateral rights in such lode adverse to those of complainant, and under one of which it had commenced to extract ore from such lode, the remedy of complainant at law by an action of ejectment was not adequate, so as to exclude the jurisdiction of equity to entertain a bill to quiet title to complainant's entire claim, including all that portion of the lode in which it claimed extralateral rights.

The granting of a preliminary injunction rests in the discretion of the trial court, and its decision will not be reviewed unless it appears that its discretion was improvidently exercised.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Idaho.

The appellee, the Bunker Hill & Sullivan Mining & Concentrating Company, a corporation, brought its bill in equity against the appellant, the Empire State-Idaho Mining & Developing Company, to quiet title to the Stemwinder lode mining claim in Shoshone county, Idaho. The controversy relates more particularly to extralateral rights, and it may be best explained by reference to the following diagram:



The bill avers that the appellee owns and is in possession of the Stemwinder claim, the surface ground of which is indicated by the parallelogram a—b—d—c, excepting thereout such portions as are included within the surface lines of the Emma and Last Chance lode

claims; also excepting such parts of the lode or vein which lie within the surface lines of the Emma and Last Chance claims, and such parts thereof as lie within the extralateral rights of said last-named claims as the planes thereof extended indicate upon the said diagram. The bill alleges that the course of the apex at the surface is shown upon the diagram, and that its downward course is westwardly; that the appellee owns and is in possession of all of the said vein throughout its entire depth on its downward course between the end line planes of said Stemwinder claim marked upon the diagram respectively b—a—e—f and d—c—g—h, excepting therefrom such underground parts of said vein as are included within planes drawn through the end lines of said Emma lode claim from 1 to y, and vertical planes drawn through the end lines of the Last Chance claim, 2—1—5 and 3—4—6. The portion of the underground vein which is in controversy is defined by planes e—f and g—h, the same being the end lines of the Stemwinder extended beyond the planes of the end lines of the Emma and Last Chance claims. The bill avers that the appellant claims an interest adverse to the appellee in that portion of said vein which lies northerly and westerly of the northerly end-line plane of the Last Chance claim, 2—1—5, and that such claim is false and groundless, and is a cloud upon the appellee's title, that since September 1, 1899, the appellant, by means of underground works, of which it has exclusive possession and control, has penetrated into that part of the underground vein so claimed to lie within the Stemwinder extralateral boundaries, and beyond the end-line plane of the Last Chance northern boundary, and that said underground vein, where so penetrated, contains large and valuable ore bodies which the appellant is extracting and threatens to extract and remove unless enjoined. Upon the filing of the bill an application was made for an injunction. The application was heard upon affidavits and counter affidavits, and thereupon the appellant was enjoined from extracting such ore pending the suit. On July 12, 1902, the appellant filed a demurrer and an answer to the bill under a stipulation providing that the demurrer should not be deemed to be waived by the answer, and thereafter the demurrer was argued and was overruled. Upon application of the appellant, the injunction order was thereafter vacated, and a further hearing was had upon the application for an injunction, and on the pleadings and the affidavits which were already on file. The court again enjoined the appellant as before. From that injunction the present appeal is taken. See 106 Fed. 471; 108 Fed. 189.

W. B. HEYBURN, for appellant.

CURTIS H. LINDLEY, HENRY EICKHOFF, M. A. FOLSOM, and JOHN R. MCBRIDE, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is assigned as error that the court overruled the plea which was filed by the appellant at the time of the hearing of the application for the injunction. The matter of the plea was, first, a former judgment between the two parties; and second, another action pending. The plea of a former judgment alleges: That on September 29, 1898, an action at law was commenced by the appellee against the appellant and the Last Chance Mining Company, in which the appellee alleged that it owned the Stemwinder mining claim, together with the lode or vein above referred to, and on its downward course, including the ledge and ore bodies which are in controversy in the present suit, and that the appellant and the Last Chance Mining Company were in possession of said ore bodies, and demanded judgment for the recovery and possession of the said property, and for the sum of $200,000 damages for ore extracted therefrom. That the defendants therein answered denying the title of the appellee and its possession, and denying that the appellant was in possession of said lode, or had extracted therefrom the ore as charged in the complaint. That the said cause was tried before the court without a jury, and a judgment was rendered in favor of the plaintiff therein as to that portion of the Stemwinder lode lying between lines drawn on the plane of the south side line of the Emma claim and the south end line of the Stemwinder claim extended in their own direction, but in favor of the defendants therein as to all of the ground claimed by the Last Chance Mining Company in its answer in said

action. That upon separate writs of error from this court to review said judgment that portion of the judgment of the circuit court in favor of the defendants was affirmed, and that portion thereof in favor of the plaintiff in said action was reversed. The plea of the pendency of another suit alleged that a suit in equity was brought by the appellee against the appellant, the appellee alleging therein the same facts as in its present bill in this suit, and praying for the same relief. As to the first portion of the plea it is sufficient to say that the premises in controversy are not the premises in controversy herein, and that no final judgment is pleaded. The reversal of a portion of said judgment by this court upon the writ of error was a reversal of the whole thereof, and operated to set aside the affirmance of the judgment which was adjudged upon the first writ, and to remand the cause for a new trial. *Montana M. Co.* v. *St. Louis M. & M. Co.* 186 U. S. 24.

The plea of another suit pending refers to a suit in equity which was ancillary to the action of ejectment just referred to. It was brought for the purpose of preserving, pending the law action, the ore bodies lying within the conflicting segments claimed respectively by the owner of the Last Chance and the appellee herein. The appellant claimed no right to the ores in controversy, but it denied that it had invaded the disputed premises. The only relief prayed for was an injunction to restrain the extraction of ore pending the law action. In the present suit the relief prayed for is a decree to quiet the appellee's title to the whole vein lying within the Stemwinder's extralateral rights, and does not include the point where it was alleged in the action at law that the appellant had trespassed. We find no error in the ruling of the court upon the plea.

It is contended that the demurrer to the bill should have been sustained both for want of equity and for the reason that the appellee had an adequate remedy at law. It is said

that there is no equity in the bill, for the reason that it appears therefrom that the possession of the property in controversy is not in the appellee, but is in the appellant. In answer to this the appellee points to the averments of the bill, which it claims establishes the fact of its possession. It is alleged therein that the appellee is in possession of the Stemwinder lode claim, describing its boundaries, and that within said claim is a mineral-bearing lode the apex of which runs through said claim northwesterly and southeasterly and across the end lines thereof, and that its downward course is to the westward, and that it extends indefinitely beyond the side lines of the claim, and within vertical planes extended in the direction of the end lines, and beyond the vertical plane of the northwesterly boundary of the Last Chance claim. The bill proceeds to allege that the appellee is in possession of all of said lode or vein so extending beyond the plane of the northwesterly end line of the Last Chance claim, and within the vertical planes of the end lines projected. Here is an averment of possession of all that part of the lode which is in controversy in this suit, the only qualification of the possession so alleged being that the appellant has trespassed on a certain portion of said lode, and is engaged in extracting the ore therefrom. But it is admitted on the argument that the possession of the appellee, if it has possession of the premises in controversy, is not an actual occupation of the ledge at any point within the lines f—e—g—h as shown upon the plat, but that it is such possession as the law imputes to the possessor and owner of the Stemwinder claim. We held in *Montana M. Co.* v. *St. Louis M. Co.* 42 C. C. A. 415, 102 Fed. 430, that the possession and ownership of the surface of a lode mining claim is the possession of the lode to the full extent of the extralateral right of the owner of the claim. A new and important question, however, arises in the present case from the fact that the extralateral right claimed by the appellee is cut in twain by those

of the Emma and Last Chance claims, and that thereby that part of the lode which is in controversy in the present suit is detached from that part which apexes within the appellee's claim. It is contended by the appellant that by the intervention of the extralateral rights, belonging to the Emma and Last Chance claims, the extralateral right of the appellee is cut off, and the appellant asserts the right to mine the ledge in question by reason of other claims located to the northwestward of the Last Chance, but subsequent in time to the Stemwinder location. We know of no case in which this precise question has been presented. In *Empire State-Idaho M. & D. Co.* v. *Bunker Hill & Sullivan M. Co.* 52 C. C. A. 219, 114 Fed. 417, this court recognized the extralateral right of the San Carlos claim beyond the point where the prior extralateral right of the Viola claim ended, but in that case the Viola extralateral right did not wholly intervene at any point to cut off the ore body to which the San Carlos had the extralateral right; in other words, there was in that claim upon the outcrop of the ledge in the surface location a point from which the owners of the San Carlos could, without interruption and continuously, proceed on the ledge on its downward course to the full extent of the extralateral right awarded by the court. By section 2336 of the Revised Statutes [U. S. Comp. St. 1901, p. 1436] it is provided that where two or more veins intersect or cross each other the prior locator shall be entitled to all the mineral contained within the space of intersection, and that the subsequent locator shall have the right of way through the space of intersection for the purpose of the convenient working of his mine. The case so provided for by statute is not the precise case of two conflicting extralateral rights upon the same ledge, which is here presented, but in principle it is the same. If the vein upon which the Stemwinder is located were in fact a separate vein from that on which the Last Chance is located, but passed through the latter in the same

direction in which extralateral rights are claimed in the present suit, there could be no doubt of the right of the owner of the Stemwinder to pursue the vein beyond the point of intersection, and to maintain a right of way through the vein of the Last Chance at the point of intersection. We see no reason why that right, which is so recognized by the statute, and which would probably be recognized in the absence of a statute, shall be denied when the point of intersection of extralateral rights is not upon separate veins, but upon the same vein. If this conclusion is correct, it follows, we think, that the possession of the ore body at the surface carries with it the possession of all that belongs to the location. The mining right is an integral one. It is secured by a single location. The title to it is conveyed by one patent. The bill, moreover, does not recognize possession in the appellant of the ore body to which the appellee seeks to quiet title. It alleges a trespass upon the vein, and the extraction of ore therefrom, and the threat of the appellant to continue to extract such ore. These facts call for the intervention of equity. *Simmons Creek Coal Co.* v. *Doran,* 142 U. S. 417; *Pardee* v. *Murray,* 4 Mont. 234, 2 Pac. 16; *Barr* v. *Gratz,* 4 Wheat. 213; *Hunnicutt* v. *Peyton,* 102 U. S. 333.

Nor do we find that the court erred in overruling the demurrer on the ground that the appellee had an adequate remedy at law. It is true that by an action of ejectment the appellee might have determined the question of its title and right to the possession of that particular portion of the ledge upon which the appellant is alleged to have trespassed. But that relief is not all that the appellee is entitled to, if the averments of the bill are true. The suit is brought to determine the adverse claims of the appellant as to the whole of the ore body lying between the planes of the appellee's end lines projected beyond the extralateral rights of the Last Chance. In answering an action of ejectment, the appellant would have been required to set up only its claim of right

and title to the ore body at the particular spot where it had taken possession. The judgment would have left undetermined the question of its right to other portions thereof. That it in fact asserted adverse claims to other portions is shown by its answer in this suit, in which it set up ownership of several claims located along the lode northwestward from the Last Chance claim, the extralateral rights of which would, but for the Stemwinder location, include separate portions of the ore body the title to which the appellee seeks to quiet. No remedy would be adequate unless it quieted the title of the appellee to the whole subject of the controversy. As was said in *Kilbourn* v. *Sunderland,* 130 U. S. 506, 514, 32 L. Ed. 1005: "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances." See also *Gormley* v. *Clark,* 134 U. S. 349, 33 L. Ed. 909; *Coosaw M. Co.* v. *South Carolina,* 144 U. S. 550, 36 L. Ed. 537.

The remainder of the assignments of error challenge the injunction order on the ground that it was not sustained by the facts as they were shown by affidavits upon the hearing. These are matters which pertain to the merits of the controversy. Upon an inspection of the affidavits and the issues in the case, we are not convinced that the court abused its discretion in granting the injunction. The question of granting an injunction pending the suit was one which rested in the sound discretion of the trial court, and its decision will not be reviewed unless it appears that legal discretion was improvidently exercised. *Duplex Printing Press Co.* v. *Campbell Printing Press & Mfg. Co.* 16 C. C. A. 220, 69 Fed. 250; *Bissel Carpet Sweeper Co.* v. *Goshen Sweeper Co.* 19 C. C. A. 25, 72 Fed. 545; *Southern Pacific Co.* v. *Earl,* 27 C. C. A. 185, 82 Fed. 690.

The decree is affirmed.

RUBIE COMBINATION GOLD MINING CO. v. PRINCESS ALICE GOLD MINING CO.

(31 Colorado 158; 71 Pac. 1121. Supreme Court. March 2, 1903.)

That an escrow deed delivered without authority, or obtained fraudulently, conveys no title, is elementary law.

Restoration to status quo. On a bill to rescind it is essential that there be an offer to return the consideration or part consideration already received.

Damages in equity case. Where the complainant sought the cancellation of a deed only, and did not ask for any legal relief, he was not entitled to a judgment for damages, even though the facts showed him to be entitled thereto.

Deed valid without corporate resolution. Family affair. Where practically all the stock is held by husband and wife and daughter, who assent to receipt of money and to delivery of the corporate deed, the transaction is valid without formal authorization on the minutes.

Appeal from District Court, El Paso County.

[1]Execution and delivery of deed held a condition precedent to recovery of money held on deposit as the purchase price. *Soderberg* v. *Crockett*, 17 Nev. 409.

Defendant allowed to show that recorded deed was in fact an escrow. *Minah Co.* v. *Briscoe*, 47 Fed. 276.

Status of the title while deed remains in escrow; duties of custodian stated: Attempt to pay off lien and deduct it from purchase money notes. *Wolcott* v. *Johns*, 7 Colo. App. 360; 44 Pac. 675.

Right of buyer to have deed properly executed by all the selling coowners. *Ingram* v. *Golden T. Co.* 25 Wash. 318; 65 Pac. 549.

When land was conveyed to B. and by B. to C., both deeds being placed in escrow, but the deed to B. to be in any event delivered: *Held*, that B. had an interest in the land which was subject to levy and sale *Green* v. *Daniels*, 115 Fed. 449.

Besides making payments by certain dates the grantees in an escrow were to pay 35 per cent royalty; *Held*, that failure to make the payments defeated the right to purchase but did not rescind the contract, and the owners were entitled to recover the royalties. *Frank* v. *Bauer*, 19 Colo. App. 445; 75 Pac. 930.

Action by the Rubie Combination Gold Mining Company against the Princess Alice Gold Mining Company. From a judgment for defendant, plaintiff appeals. Affirmed.

MESSRS. ADY & SHEAFOR, for appellant.

MR. T. M. S. RHETT, for appellee.

CHIEF JUSTICE CAMPBELL delivered the opinion of the court.

Action to cancel a deed to mining property, to forfeit a lease, and for an accounting. The Rubie Combination Gold Mining Company, being the owner of the property, acting through its board of directors, in which such power was vested, gave to James A. Twitchell a lease and bond on the Lafayette mining claim, situate in the Cripple Creek mining district. The term of the lease was for fifteen months. It was in the ordinary form and provided for the payment of a specified royalty. The bond was conditioned upon payments by the grantee to the grantor of the sum of $20,000, before the end of the lease, such payments to be made at different times and in different amounts, which were specified therein. About four months after they were executed, the lease and bond, with the consent of plaintiff, were transferred and assigned by Twitchell to the Princess Alice Gold Mining Company, which, having succeeded to his rights and assumed his obligations thereunder, at once took possession of, and operated, the mine under the lease. Before this action was begun it had paid upon the agreed purchase price the sum of $15,000.

In pursuance of the terms of the bond and lease, the plaintiff company, by its board of directors, executed a deed to the mining claim and placed the same in escrow with the First National Bank of Colorado Springs, to be delivered

to the Princess Alice Company, as the assignee of Twitchell, upon compliance by it with the terms agreed upon, which were endorsed on the envelope enclosing the escrow. The first payment of $5,000 upon the bond was made in accordance with the agreement, and a short time before the second payment of $5,000 became due upon the initiative of the plaintiff company, through its president, negotiations were set on foot with the defendant company, acting by its authorized agent and manager, which resulted in a modification of the terms of the bond. This new agreement was that if the defendant at once paid in cash $10,000, plaintiff would accept the same in lieu of the sum of $15,000 which was still due under the terms of the original agreement, but not payable for several months. This proposition was accepted by defendant, the $10,000 were paid, and the bank, under the written instruction of plaintiff's president, delivered to defendant the escrow deed, which was afterwards duly recorded.

The plaintiff thereupon brought this action, alleging, among other things, that the defendant had not observed the terms of the lease with respect to the payment of royalty, and that surreptitiously, fraudulently, and against the consent of plaintiff, it obtained possession of the escrow; and in the prayer for relief asked that the $15,000 of the purchase money already paid by the defendant be declared forfeited, that the deed be cancelled and held for naught, and that an accounting be had to ascertain the amount of royalty still due. The trial court found the facts in favor of the defendant and dismissed the action.

Upon the trial, and also here, plaintiff abandoned its claim for a forfeiture of the lease and for an accounting, and its position now is that there should have been a cancellation of the deed because it was delivered fraudulently and without its consent; or, if this cannot be done in accordance with the principles of equity, that a money judgment be given

in its favor for the entire sum of $15,000; or if, in the circumstances of the case, it is inequitable either to cancel the deed or to require defendant to pay the entire sum of $15,000 after it has paid $10,000 of that amount to plaintiff's president, then that plaintiff should have a money judgment for the $5,000 remaining unpaid on the purchase price, together with interest thereon.

1. It is well to bear in mind that this is an action for the cancellation of a deed which was in escrow, and, as alleged, was obtained from plaintiff by defendant's fraudulent conduct. That an escrow delivered without authority, or obtained fraudulently, conveys no title, is elementary. Of the entire consideration of $20,000 which the defendant agreed to pay the plaintiff for the property described in the escrow deed, $15,000 were paid by defendant, and received by plaintiff, before the action was brought. It appears in the complaint, as well as by the proof, that it was within the power of the plaintiff to place the defendant *in statu quo* by returning the $15,000 which it received. There is, however, no allegation in the complaint, nor was there at the trial, an offer to return this amount. Indeed, one prayer of the complaint is that this payment be declared forfeited to plaintiff. That it was incumbent upon plaintiff, under the facts of this case, to place defendant *in statu quo,* is established by an unbroken line of authorities. *Hamill* v. *Thompson,* 3 Colo. 518; *Bliley* v. *Wheeler,* 5 Colo. App. 287; 11 Am. & Eng. Enc. Law (2d Ed.), 160.

Appellant, however, relies upon *Jackson* v. *Lynn,* 94 Ia. 151, reported, also, in 58 Am. St. Rep. 386, as an authority for its contention that it was not necessary, either in the complaint or at the trial, to offer to return that part of the purchase money which it had received. The court, speaking by Mr. Justice Deemer, bases its decision that the plaintiff there was not required to tender back the consideration he had received upon the fact that the action was to set aside a stolen

deed in which the plaintiff was insisting upon the letter of his contract. The learned judge observed, however, that if the action were one to rescind a contract upon the ground of fraud, plaintiff would be compelled to make tender back of all that he had received, which is exactly the case at bar.

Appellant, moreover, further contends that the company did not receive or get the benefit of the last payment of $10,000 made by the defendant, although it was paid to its president and he may have appropriated the same to his own use. The findings of the court must have been in favor of the appellee upon this question of fact, and it is quite clear, from the record, that this sum was ultimately deposited to the credit of the plaintiff's bank account.

2. It is not necessary, under the facts of this case, to determine whether, if the complaint contained the necessary averments, the court might award the plaintiff relief in the way of damages. The pleading was framed entirely upon the theory that plaintiff was entitled to a rescission, and there are no allegations upon which a judgment awarding damages could be rendered, even if the proof showed plaintiff was entitled thereto. Courts have sometimes awarded to a plaintiff damages when in his complaint he has asked both legal and equitable relief, when the latter could not be given, but it is only where plaintiff in his complaint has shown that he is entitled to that kind of relief. It is not enough that his evidence showed that he has made a case that calls for some relief. But aside from this, if proper allegation had been made for a money judgment, plaintiff was not entitled to recover the balance of the purchase price in this action, for such balance was not due at the time it was instituted. *Miller* v. *Hallock,* 9 Colo. 551; *Greer* v. *Heiser,* 16 Colo. 306, 312; *Mullen* v. *McKim,* 22 Colo. 468, 474.

Under the pleadings and the evidence we are of opinion that plaintiff was not entitled to any sort of relief, and that the court was right in dismissing the action. In coming

to this conclusion we have not overlooked the fact that no formal action was taken by the board of directors of plaintiff company authorizing a modification of the terms of the bond. The minutes of the company do not show that the act of its president in delivering the deed to the defendant was expressly authorized, but it is clear that negotiations leading up to the subsequent agreement were conducted in the presence of two of the three directors of the plaintiff company, who are substantially the owners of every share of the capital stock, and that they consented to accept the $10,000 cash and deliver the escrow. The plaintiff company was a sort of family affair. All of its capital stock was owned by a husband, his wife—the former the president, the latter the secretary and treasurer—and by her daughter, who held stock enough to qualify her as a director and these three constituted the board of directors. The president was permitted by the other directors and stockholders to conduct all its business in connection with this transaction, and was clothed with apparent authority to take the action which he did in this case. No question is made as to the authority of the board to execute the deed, the only contention being that the president had no authority to change the terms of the escrow.

Plaintiff company received and had the benefit not only of the first payment of $5,000 on the purchase price, but also the last one of $10,000, knowing how it was received, and it would be inequitable to permit the plaintiff to rescind this contract while retaining such purchase money. Supporting the conclusion at which we have arrived, see *Senour Mfg. Co.* v. *Clarke,* 96 Wis. 469.

The judgment is affirmed.

Affirmed.

REES DAVIS ET AL. v. JAMES H. SHEPHERD.

(31 Colorado 141; 72 Pac. 57. Supreme Court. March 2, 1903.)

A vein is parcel of the location which embraces it although it enters on its downward course under an adjacent location.

After answer to the merits it is too late to complain of indefinite description of the premises.

[1]**Discovery presumed after patent.** After patent issued the question whether the vein patented contained mineral of value cannot be collaterally raised.

Width, how fixed. Where the end lines of a mining claim are not at right angles with the side lines, the distance between the side lines, and not the length of the end lines, measures the width of the claim.

Location over old stope. The fact that before the location of plaintiff's claim a part of a vein apexing therein and also in defendant's claim, had been stoped out by defendant at a point beyond the surface lines of plaintiff's claim, did not destroy plaintiff's extralateral rights to the vein below the point of removal.

[2]**Vein leaving side line.** The right to follow the vein extralaterally ceases at the point where the vein leaves the side line.

[3]**Allowing an adjoining claimant to work** through a shaft on plaintiff's ground is not an estoppel to deny defendant's title to the vein so approached.

Overlapping end lines. A junior locator may project the end line of his claim over the surface of a senior location for the purpose of fixing the extralateral right to so much of the vein located as is subject to location.

Adverse possession of a mining claim cannot extend to a portion of a

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[1]*Calhoun Co.* v. *Ajax Co.* 21 M. R. 381.

[2]*Cons. Wyoming Co.* v. *Champion Co.* 18 M. R. 113.

[3]*Empire M. Co.* v. *Tombstone Co.* 20 M. R. 443.

The right to maintain ejectment depends on the fact that defendant was in possession when the suit was brought, and the fact that plaintiff was in possession before or since is not material. *Walton* v. *Wild Goose Co.*, 22 M. R. 688.

Where plaintiff has no valid location prior possession in defendants prevents his recovery in ejectment; nor can he be allowed to prove defects in defendants' title. *Benton* v. *Hopkins*, 74 Pac. 891.

No recovery can be had on an equitable title in an action of ejectment. *Virginia Co.* v. *Crane's Nest Co.* 102 Va. 405; 46 S. E. 393.

vein apexing outside the limits of the claim, and consequently no part thereof.

Error must be specific. The refusal of an instruction cannot be regarded as prejudicial error unless appellant points out the testimony requiring the refused instruction.

Sufficient description in verdict on apex suit. The jury returned a verdict that the vein apexed within the boundaries of the Refugee claim except that portion apexing between a point on the side line of defendant's claim eight feet westerly from the southeasterly corner of that claim and the point where it passed through the easterly end line of the latter, and that plaintiff was entitled to the possession of so much of the vein as apexed within the boundary of his claim, even though in its downward course it might depart from a perpendicular, so as to extend outside the vertical side lines of that claim, except so much of said claim as "you" find the apex thereof to be in defendant's claim. *Held*, that the verdict was sufficiently definite in its description of the premises to comply with the requirements of the Code.

The court may amend a verdict to correct a patent verbal error.

Where a verdict in ejectment fails to find damages claimed, its effect as a verdict for recovery of land is not vitiated.

Appeal from District Court, Clear Creek County.

Action by James H. Shepherd against Rees Davis and another. From a judgment for plaintiff, defendants appeal. Affirmed.

The main controversy between the parties to this appeal is the question of extralateral rights between the Refugee and Fairmount lode mining claims. There is a partial conflict between the surface boundaries of the two claims. The owner of the Refugee brought an action in ejectment against the owner and lessee of the Fairmount, claiming that defendants were working a vein apexing in the Refugee ground.

GEORGE S. REDD, GEORGE W. TAYLOR, and I. N. SMITH, for appellants.

BULLIS & WILLIAMS, for appellee.

MR. JUSTICE GABBERT delivered the opinion of the court.

The complaint alleged, in substance, that the defendants wrongfully and unlawfully entered upon the Refugee lode mining claim, and on the vein or veins thereof crossing the end lines and apexing within its boundaries, and wrongfully ousted and ejected the plaintiff therefrom. It is contended by counsel for appellant that the complaint does not state a cause of action based upon extralateral rights. Two reasons are assigned in support of this claim: (1) That it only describes a vein within the boundaries of the Refugee extended downward vertically; and (2) it does not allege that this vein contains minerals. If rights to a mineral vein embraced in a mining location were limited as at common law, the first point made might be good. A vein properly located is part and parcel of the location within which it is embraced throughout its entire depth, within the limits defined by law, even though on its downward course it enters an adjacent location. Sec. 2322, Rev. Stats. U. S.

The complaint alleges a trespass upon a vein apexing within the surface boundaries of the Refugee claim and intersected by its end lines. According to these averments, under the law fixing the rights to this vein, such trespass may have been upon the vein in ground underneath the surface boundaries of the Fairmount claim extended downward vertically, or without such ground, within the boundaries of the Refugee. This, however, is not essentially material. The charge was a trespass upon a vein which was part and parcel of the Refugee. If for any reason it was desirable to have the complaint more definite, as to the point where the trespass was committed, a motion to that effect should have been interposed. Having answered on the merits, it is too late to raise the question now. *Rosenfeld* v. *Rosenfeld,* 21

Colo. 16. The Refugee is a patented claim. Before patent the question of whether the Refugee vein carried precious minerals in appreciable quantities might, in an appropriate action, have been a material question of fact, but after patent it cannot be raised collaterally. The government has granted the owner of the Refugee all veins the top or apex of which lie inside of the surface boundaries of the claim extended downward vertically, and after patent the presumption must be that the vein or veins embraced within the claim are of the character which the law contemplates.

According to the description of the Refugee in the complaint, it is asserted that the claim is of greater width than the law allows, and for this reason the validity of the patent is assailed. It is not necessary to determine what might be the effect upon the patent if this claim was correct, because it appears that it is not. The end lines are not at right angles with the side lines, and, therefore, do not represent the distance between them. The width of a mining claim, when that is the only question involved, is the distance between the side lines. Thus measured, the Refugee is not of greater width than the law permits.

The vein in controversy, except a small portion, apexes entirely within the boundaries of the Refugee claim. The Fairmount is the older location, having been located in the year 1869, on the dip of the vein, and subsequently patented. Before the location of the Refugee a considerable portion of the vein was worked out by the claimants of the Fairmount. Counsel for appellants contend that the stoping out of the mineral has broken the continuity of the vein, and that, therefore, the owner of the Refugee can claim no extralateral rights in that portion of the vein below such workings; and further claim that inasmuch as the Fairmount was located under the act relative to mining claims passed in 1866, that the Refugee has no extralateral rights as against the Fairmount to the vein upon which that location is based.

In short, that the owners of the latter are entitled to the vein for the full length of the claim without regard to its location with respect to the boundaries of the claim. That a portion of the vein has been removed does not change the fact that the vein below the point of such removal is the same as the one apexing within the Refugee ground. That is the test to apply in determining the question of ownership as between the parties to this action.

Under the act of congress of 1866, the right to follow a vein upon its strike is limited to the lines of the survey purporting to embrace it. This question has been definitely settled by the supreme court of the United States. *Flagstaff M. Co.* v. *Tarbet,* 98 U. S. 463, and it is unnecessary to more than briefly discuss it. The act contemplated a location along the vein, and hence the point at which the apex of such vein, in its course, departs from either side line of the claim, marks the point where the right to follow it on the strike under such location ceases, and extralateral rights are limited accordingly. *Wolfley* v. *Lebanon M. Co.,* 4 Colo. 112; *McCormick* v. *Varnes,* 2 Utah 355; 1 Lindley on Mines, §§ 53-60; Morrison's Mining Rights (10th Ed.), 133.

It is next contended by counsel for appellants that appellee is estopped by his conduct from maintaining this action, because he disclaimed any interest in the vein now in controversy, in effect abandoned it, and misled the appellants to their injury and prejudice; and also that the court erred in refusing testimony in support of this defense. The record wholly fails to disclose anything supporting this claim. One of the defendants was the owner and the other the lessee of the Fairmount. It appears that what is known as the Fairmount shaft was sunk partially upon both claims; that the defendants applied to the owner of the Refugee for leave to work the Fairmount property through this shaft, which was granted. Nowhere does it appear that the owner of the Refugee ever granted them any right to work the vein in con-

troversy within the limits of that location, nor was there any testimony offered which tended to prove that fact, or that he disclaimed any interest in this vein. On the contrary, one of the appellants admits that the appellee told him he had no objection to his working the property through the shaft, but that he did not want him to work on Refugee ground, to which the witness replied that he did not want to. At this conversation appellee further stated to the appellant that he had a vein in the Refugee which he did not propose to let anybody work.

A shaft had been sunk on the vein from its apex on the Refugee down to a stope extended from workings on the Fairmount. On the trial of the cause counsel for appellants asked a witness whether or not this shaft was dangerous. The court sustained the objection, and this ruling is assigned as error. If the condition of this shaft could have been the subject of expert opinion evidence, it was wholly immaterial in this case. Whether the shaft was or was not dangerous to any one who might attempt to pass through it, could have no bearing whatever upon the issues between the parties. The exclusion of immaterial testimony is not error.

It was sought to establish, on the part of the appellee, that the vein upon which this shaft was sunk was the same which the appellants were working. Counsel for the latter asked a witness questions to the effect as to whether or not the shaft had been constructed with the view of obliterating what was disclosed with respect to the relative position of the vein and the ground surrounding, and if from the mode of construction there was anything to indicate an intention to conceal the vein. These questions were objected to, and the objections sustained, for the reason that it was not proper for a witness to give his opinion on these subjects. There was no error in this ruling. If this testimony was material, it only referred to matters which persons of average ordinary intelligence were capable or competent of determining for

themselves, from the facts from which the inference sought to be established might be deduced.

The vein in its strike apexes within the Refugee ground, with the exception of a few feet across the corner of the Fairmount. The end lines of the Refugee are each some distance from this point. It is claimed that the vein crossing Fairmount ground breaks its continuity, and as we understand the argument of counsel, they contend that appellee can claim no extralateral rights except upon the theory that he is permitted to construct imaginary end lines at the point where the vein in its strike crosses the boundaries of the Fairmount. This view is not tenable. The Refugee would take no portion of the vein apexing within the lines of the Fairmount, but the extralateral rights to the vein outside would be determined by the end lines actually established, in connection with the boundaries of the Fairmount. In this connection it is urged that because the northerly end line of the Refugee is partially projected within the boundary lines of a prior claim, and the vein does not cross this line in "free ground," as it is termed—that is to say, crosses such line within the boundaries of a prior claim—that, therefore, it has no legal north end line. This proposition has been settled adversely to the contention of counsel for appellant, in *Del Monte M. Co.* v. *Last Chance M. Co.* 171 U. S. 55. In that case the court had under consideration this question: "May any of the lines of a junior lode location be laid within, upon, or across the surface of a valid senior location for the purpose of defining for, or securing to, such junior location underground or extralateral rights not in conflict with any rights of the senior location?" The court answered the question in the affirmative, subject to the qualification that no forcible entry is made. In other words, as applicable to the facts of this case, the decision of the court was that, subject to the qualification noticed, a junior locator may project the end line of his claim across the surface of a senior

location for the purpose of fixing the extralateral rights to so much of the vein located as is subject to location.

The instructions given are challenged, and exceptions were also taken to the refusal of the court to give those requested by appellants. The court instructed the jury to the effect that, although the Fairmount was patented before the Refugee, that the Fairmount would not include any part of the Refugee vein, which had its apex outside of the surface boundary lines of the Fairmount, and that so much of the vein as apexed outside of the Fairmount and within the boundaries of the Refugee belonged to the latter. This instruction is challenged upon the ground that it nullified the defense of the statute of limitations interposed by appellants to the effect that they and their grantors had been in the possession of the Fairmount for more than seven years immediately prior to the time this action was commenced, under claim and color of title in good faith, and during that period had paid all taxes legally assessed upon the premises. This defense could only extend to that portion of the premises which was embraced within the boundaries of the claim, and to such rights as attached thereto. All that part of the vein in controversy which apexed without the boundaries of the Fairmount was not a part of that property, for reasons already given, and, consequently, was not covered by any written evidence of title under which they claim the ownership of the premises.

It is also contended that these instructions were erroneous because they ignored the proposition of the union of veins. Instructions must be considered as a whole, and we find that the court, in another instruction, gave the law fully and correctly on this subject.

Numerous instructions requested were refused, which we shall not attempt to notice in detail. They were either substantially covered by those which the court gave of its own motion, were immaterial to the issues, or the questions thereby

raised have been disposed of by the previous questions determined; and as to the remainder, even if they correctly state the law, we are unable to determine their materiality, because no testimony is pointed out bearing on the issues which it was sought thereby to submit to the jury. It is not erroneous to refuse instructions which have already been given, or which do not relate to any issue involved. Neither can we determine whether an instruction refused was prejudicial error, unless our attention is directed to testimony from which it appears that some issue was involved which justified such instruction.

The jury returned a verdict which was to the effect that they found the issues joined in favor of the plaintiff, and that the vein in controversy apexed within the boundaries of the Refugee claim, except that portion apexing between a point on the side line of the Fairmount eight feet westerly from the southeasterly corner of that claim, and the point where it passes through the easterly end line of the latter, and that plaintiff is entitled to the possession of so much of the vein as apexed within the boundaries of the Refugee, even though in its downward course it might depart from a perpendicular so as to extend outside of the vertical side lines of that claim, "except so much of the said vein as *you* find the apex thereof to be in survey 195a (the Fairmount)." Counsel for appellant contend that this verdict does not comply with the provisions of the Code in two respects: (1) It does not describe the premises in controversy with sufficient certainty; and (2) although a claim for damages was made by plaintiff, the verdict was silent on this question. The purpose of a verdict is to respond to and decide the issues between the parties to such an extent and with a sufficient degree of certainty, so that judgment can be entered thereon settling the rights of the parties under the issues presented. *Stafford* v. *King*, 30 Tex. 257, 94 Am. Dec. 304. The verdict is sufficiently specific to comply with the law in this respect. The

real subject-matter of controversy was a vein; the verdict of the jury has designated what portion belongs to each claim, so that a judgment could be entered in accordance with their findings on this subject, definitely fixing the rights of the parties to the matter in dispute, and all its incidents.

It is true the plaintiff claimed damages, but because none were returned by the jury is not a matter of which the defendants can complain. They were not prejudiced by the action of the court in failing to assess damages. After the verdict was received and filed and the jury discharged, the court permitted it to be amended by inserting the word "we" instead of "you," in that portion above quoted. This was not error; it was patent that the jury intended to employ the word "we" instead of "you," and the court had the power, even if it were necessary to make any correction, to so amend the verdict as to make it show the real intention of the jury, as exhibited by the verdict itself. *Schoolfield* v. *Brunton,* 20 Colo. 139.

The final question relates to the alleged misconduct of the jury. It presents no proposition of sufficient merit or importance to constitute reversible error.

The judgment of the district court is affirmed.

Affirmed.

AJAX GOLD MINING CO. v. E. J. HILKEY ET AL.

(31 Colorado 131; 72 Pac. 447. Supreme Court. March 2, 1903.)

Where the discovery vein leaves the claim through a side line which fixes the limit of its extralateral rights to such discovery vein but a secondary vein is found having an apex going through both side lines such secondary vein has extralateral rights between the two points at which it leaves the side lines.

[1]**The end lines of the discovery vein** are not necessarily the end lines of a secondary vein; the extralateral rights of such secondary vein may extend beyond them.

Appeal from District Court, Teller County.

Action by the Ajax Gold Mining Company against E. J. Hilkey and others. From a judgment for defendants, plaintiff appeals. Reversed.

MESSRS. COLBURN & DUDLEY and MR. J. C. HELM, for appellant.

MR. W. O. TEMPLE and MR. S. D. CRUMP, for appellees.

CHIEF JUSTICE CAMPBELL delivered the opinion of the court.

This is an action by the owner of the Victor Consolidated, against the owner of the Triumph, mining claim, to recover for the value of ores taken from a vein within the limits of the Triumph lode, of which both parties assert ownership.

The defendants say the ores belong to them because the vein from which they were extracted is within the outer

[1]*Contra: Walrath* v. *Champion Co.* 19 M. R. 410. *Cosmopolitan Co.* v. *Foote*, 20 M. R. 497. *St. Louis Co.* v. *Montana Co.* 21 M. R. 57.

boundaries of their location, while plaintiff's ownership is based upon an apex right under section 2322, Revised Statutes of the United States. Only one important question is raised by the appeal of the apex claimant, who failed below, and this arises out of the following instruction given to the jury at the instance of the defendants:

"If you believe, from the evidence in this case, that the discovery lode of the Victor Consolidated claim passes out of either side line of that claim before reaching the northerly end line of said claim, as originally located, then the rights of the plaintiff to any ore outside the surface boundaries of said claim in any vein having its apex within such claim are limited to two parallel bounding planes, one drawn through the southerly end line of said Victor Consolidated claim as originally located, and the other passing through the said claim parallel to said southerly end line at the point where such discovery vein may have been shown to depart from its side lines, if such departure has been shown."

Both parties agree that by it the jury were, in effect, told that if the discovery vein of a lode mining claim on its strike departs through a side line, no extralateral rights attach to any other vein apexing within the claim beyond the point of such departure.

The question thus presented seems not to have been expressly determined by the supreme court of the United States or any of the inferior federal or state courts. In the absence of any decision at all construing the act of congress, we would not have much, if any, doubt as to its meaning. Its language is broad enough to sustain appellant's contention that the owner of a lode mining claim has extralateral rights in and to all veins the top or apex of which lies within its surface lines extending downward vertically, to the extent, at least, of the length of the apex within such boundaries, even though the discovery vein on its strike does not cross both end lines. For the statute provides that owners of such claims:

"Shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges, may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."

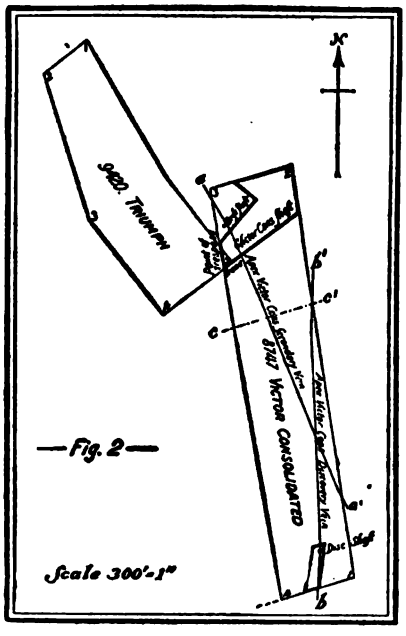
The only express limitation to this comprehensive grant is found in the proviso of the same section, which declares that the right of possession to such outside parts of veins

"shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges."

There does not seem to be anything ambiguous or uncertain in this language, and, indeed, appellees' counsel are disposed to concede that, taken literally, it affords some warrant, at least, for appellant's position; but they say that by numerous decisions construing the statute the courts have enunciated several propositions that somewhat restrict its apparent scope. Appellees' position cannot be better presented than in the language of their learned counsel, and a statement of their propositions serves to bring out sharply the respective contentions so ably argued on both sides. The following map will also aid in an understanding of the controversy.

The apex of the discovery vein of the Victor Consolidated is represented by b,b'. It enters the claim at the south end line, and its course in the main runs parallel with the claim as surveyed, but passes out through the east side line about 1,000 feet from the south end line. a,a' is the vein which, as contradistinguished from the discovery vein, we call the secondary vein, which the evidence tended to show passes diagonally across the location, entering it through the west, and leaving it through the east side line. The Triumph claim

is correctly delineated on the map. If the ore taken from the underground workings of the Triumph was taken from any vein apexing within the Victor Consolidated, as some of the evidence tended to show, it was from this so-called secondary vein. Stating the contention again, in a concrete form, the jury were told if the discovery vein of the Victor Consolidated crossed the east side line at c′, then the rights of the plaintiff to ore outside of its surface boundaries, in any vein



having its apex therein, are limited to two parallel bounding planes, one drawn through the south end line 1,4 of the location, as originally established, and the other passing through the claim at the point where the discovery vein leaves the east end line and parallel to the south end line at c,c′. The north end line, or bounding plane, of this right is the dotted line c,c′, and the south bounding plane the south end line of

the location 1,4. Plaintiff's extralateral rights as to all veins within the surface lines were, by this instruction, restricted to that part of the claim south of the line c, c', and in that part between this line and the north end line of the claim he was given none whatever, though about 500 feet of the apex of the secondary vein was found in this latter segment.

The three propositions of law said to be established by the decisions, of which the fourth one stated by appellees is said to be a necessary corollary, are:

1. There can be but one set of end lines or bounding planes for a single location, and these limit the extralateral right upon all lodes or veins apexing therein.

2. These end lines or bounding planes are determined by the strike of the discovery vein with reference to the located side and end lines of the claim.

3. Where the apex of the discovery vein passes through one end and one side line the extralateral right upon such vein will be bounded by a vertical plane drawn downward through the crossed end line and another vertical plane parallel thereto, but operating at the point where the apex leaves the side line.

The fourth proposition they thus express: "The necessary logical sequence of these propositions is, that where the discovery vein on its strike departs through a side line, no extralateral rights attach to any other vein apexing within the claim beyond the point of such departure."

Since appellant concedes the first three propositions, there is no necessity for discussing them or citing the authorities upon which they rest. But the alleged deduction therefrom appellant vigorously combats, and that presents the question for our decision. We first observe that that part of appellees' argument to the effect that where a location is laid across, instead of along, the discovery vein, the end lines become the side lines of the location, and the side lines become the end lines, is not pertinent to anything now before us, and in so

far as the deduction depends on such proposition, it is without support. There is no dispute between counsel as to this doctrine of shifting of side and end lines, in the case supposed, but it is wholly inapplicable here, for the Victor Consolidated location is laid *along* the course of the discovery vein, and this vein enters the claim through the south end line, and passes out under the east side line. Besides this, the location is patented, and there is authority for saying that its end lines, as chosen by the locator and described by the patent, are, for all purposes and under all circumstances, to be taken as the fixed end lines.

But conceding the correctness of all three propositions, as to which the counsel upon both sides are in accord, we cannot agree with learned counsel for appellees in their ingenious argument that the fourth proposition, which they must establish in order to sustain the instruction complained of, is a logical sequence of either, or all, of the others. It is quite true that there can be but one set of end lines for one location, and these must perform that function not only for the discovery vein but for all other veins apexing within the surface lines. *Del Monte M. C.* v. *Last Chance M. Co.* 171 U. S. 55; *Walrath* v. *Champion Mining Co.* 171 U. S. 293, 297, 308.

This, however, does not mean that all such veins have exactly the same extralateral rights, nor can it be said that only so much of a secondary vein as apexes within that part of the claim where the apex of the discovery vein is found has such rights. In the *Walrath case, supra,* which was twice before the circuit court of appeals (63 Fed. 552; 72 Fed. 978) and once before the supreme court of the United States, there are some expressions in the opinions of the circuit court of appeals from which, taken alone, it might be inferred that under facts like those here present, the owner of a claim would have extralateral rights in the discovery vein even beyond the point where, on its strike, it leaves the side line,

and that the bounding planes, within which such rights are to be exercised, must be drawn through the two end lines. But appellant makes no such contention here, and is content with extralateral rights in the discovery vein only up to the point of its departure from the east side line, so that, for our present argument, we assume that to be the true doctrine.

The end lines constitute a barrier beyond which a locator cannot follow a vein on its strike, whether it be a discovery or secondary vein, and they also limit the bounding planes within which his extralateral rights are to be exercised in following such vein on its dip. In exercising such extralateral rights the locator cannot, in any case, pursue the vein on its dip beyond the bounding planes drawn through the end lines, but, as we have said, appellant is content to be restricted in the exercise of such rights in the secondary vein to planes drawn parallel to the end lines and passing, the one through the claim at the point where the vein enters, and the other where it departs from, the surface line of the location. The extent of the right depends upon the length of the apex, and the extralateral rights are measured not necessarily by the end lines—and only so when the vein passes across both end lines—but by bounding planes drawn parallel to the end lines passing through the claim at the points where it enters into, and departs from, the same.

It would seem, therefore, necessarily to follow that the extralateral right depends, *inter alia,* upon the extent of the apex within the surface lines, and while the end lines of the claim as fixed by the location are the end lines of all veins apexing within its exterior boundaries, the planes which bound such rights of different veins may be as different as the extent of their respective apices, though all such planes must be drawn vertically downwards parallel with the end lines. It makes no difference in what portion of the patented claim the apex is. Its extralateral rights under this rule can easily be ascertained. The apex of a secondary vein need not

be in the same portion of the claim as is the apex of the discovery vein. The statute does not say so. The decisions heretofore made certainly do not so require. The three propositions deduced from these decisions do not logically lead to that doctrine. While, as we have said, there is no decision upon the exact point, yet we think there are cases, in addition to those already cited, which necessarily lead to this conclusion, among which are *Cons. Wyoming M. Co.* v. *Champion M. Co.* 63 Fed. 540, 546. While this court, in *Catron* v. *Old,* 23 Colo. 433, criticised this case, it did not do so as to the point now under consideration. It was with reference to the doctrine of comparative direction of the lode which left to the jury, as a question of fact, whether a vein extends more along, than across, the claim, that the criticism went; and we there said this introduced an element of uncertainty which, if possible, should be avoided.

See, also: *Fitzgerald* v. *Clark,* 17 Mont. 100, affirmed by the United States supreme court, 171 U. S. 92; *Tyler M. Co.* v. *Last Chance M. Co.* 71 Fed. 848; 2 Lindley on Mines, § 591 *et seq.*

The language of Judge Hallett, when *Del Monte M. Co.* v. *N. Y. & L. C. M. Co.* 66 Fed. 212, was before him, is pertinent to the argument of appellees that there can be but one set of end lines or bounding planes for all veins covered by a single location, and that they must be the same for each. He thus disposes of it:

"It is said that we cannot make a new end line at the point of divergence or elsewhere, because the court cannot make a new location, or in any way change that made by the parties. *Iron Silver M. Co.* v. *Elgin M. Co.* 118 U. S. 196, 6 Sup. Ct. 1177. This, however, is not necessary. We can keep within the end lines fixed by the locator in respect to any extralateral right that may be recognized without drawing any line; and, if there be magic in the word 'line,' it will be better not to use it."

The opinion of Mr. Justice Brewer, when the same case

came before the federal supreme court (171 U. S. 55), is very instructive, and, as we read it, is authority for the conclusion which we have reached in the case in hand. In speaking of extralateral rights of a vein entering a claim through an end line and passing out under a side line, he said:

"Given a vein whose apex is within his surface limits, he can pursue that vein as far as he pleases in its downward course outside vertical side lines."

And referring to the proviso of section 2322, which we have hereinabove quoted, he proceeds:

"This places a limit on the length of the vein beyond which he may not go, but it does not say that he shall not go outside the vertical side lines unless the vein in its course reaches the vertical planes of the end lines. * * * Naming limits, beyond which a grant does not go, is not equivalent to saying that nothing is granted which does not extend to those limits. The locator is given a right to pursue any vein, whose apex is within his surface limits, on its dip outside the vertical side lines, but may not, in such pursuit, go beyond the vertical end lines. And this is all that the statute provides."

This reasoning applies as much to a secondary, as to the discovery, vein. It is a vein that apexes within the surface limits, and there is, to say the least, no more reason in denying to it extralateral rights, because it does not apex within that particular part of the claim where the apex of the discovery vein is, than there is for denying to any vein extralateral rights unless in its course it reaches the vertical planes of the end lines. Justice Brewer says this latter condition is not essential to the exercise of extralateral rights, and, *a fortiori,* the former is not.

Our conclusion is that for all veins, both discovery and secondary, of a patented claim, the owner has extralateral rights, at least for so much thereof as apex within the surface lines;

that such rights as to secondary veins are not confined to such veins as apex within the same segment of the claim in which the apex of the discovery vein exists; and while the end lines of the location, as fixed and described in the patent, are the end lines of all veins apexing within the surface boundaries, and may constitute the bounding planes for such extralateral rights, and in no case can the locator pursue the vein on its dip outside the surface lines beyond such planes continued in their own direction until they intersect such veins, yet these bounding planes, which in all cases must be drawn parallel to the end lines, need not be coincident. The giving of this instruction was prejudicial error. The judgment is therefore reversed, and the cause remanded.

Reversed.

F. T. CALEY v. JAMES PORTLAND ET AL.

(18 Colorado Appeals 390; 71 Pac. 892. Court of Appeals. March 9, 1903.)

[1]**Consideration payable out of net proceeds.** Where the assignee of a mining lease agrees to pay a consideration therefor out of the net proceeds of the mine, such assignee is not bound to continue work at a loss after reasonable expenditures show that net proceeds can never be reasonably expected.

Such assigned lease may be again assigned without personal liability against the assignor for breach of covenant.

[2]**A covenant to work** is not necessarily a covenant for continuous work.

Appeal from District Court, El Paso County.

Action by James Portland and another against F. T. Caley. Judgment for plaintiffs, and defendant appeals. Reversed.

Messrs. GUNNELL, CHINN & MILLER, for appellant.

[1]Parties conveyed placer claims by deed stating consideration, $2,200, and the grantor also gave his written receipt in full: *Held*, that parol evidence was admissible of a promise to pay more "if the defendant ever utilized the property for any purpose." *Cheesman* v. *Nicholl*, 18 Colo. App. 174; 70 Pac. 797.

Contract to pay out of the proceeds of the mine becomes an absolute promise to pay after lapse of a reasonable time. *White* v. *Century Co.* 28 Utah 331; 78 Pac. 868. *McIntyre* v. *Ajax Co.* 28 Utah 162; 77 Pac. 613.

The seller of ore when the buyer refuses to receive has the right to store and sue for the price or to sell and recover the difference in price. *Habeler* v. *Rogers*, 131 Fed. 43.

Contract construed to bind the seller to furnish the ore of its own mines and the fact that the buyer accepted installments of ore from other mines did not bind him to continue to receive such other product. *Shackelford* v. *Sloss Co.* 140 Ala. 329; 36 So. 1005.

On a contract to deliver ore from a certain mine, to not assay below a certain per cent, the buyer is entitled to the run of the mine, although the ore furnished was not below the agreed per cent. *Globe F. Co.* v. *Tennessee Ph. Co.* 27 Ky. L. R. 636; 85 S. W. 1177.

Mr. H. McGARRY and Mr. J. C. HELM, for appellees.

GUNTER, J. There is no substantial conflict in the evidence. Appellees, sublessees of certain mining property for a term—July 15, 1895, to February 8, 1896—made, with the consent of their lessors, the following assignment of their sublease.

"Victor, Colo. * * * This agreement made * * * by * * James Portland and Matt. Mulligan of the first part, and F. T. Caley, of the second part, in consideration of * * * one thousand dollars in hand paid, and * * * fifteen hundred dollars to be paid as hereinafter specified, do * * * hereby sell, * * * unto the said F. T. Caley all the right, title, claim, interest of, in and to the mining claim and lease hereunto attached. The said F. T. Caley agreeing to work said claim and to pay said Mulligan and Portland the said amount of fifteen hundred dollars out of the net proceeds of the said claim, they to have the full net proceeds until said sum of fifteen hundred dollars is paid in full to them.

"Witness our hands and seals this 20th day of August, 1895.

"JAMES PORTLAND, [SEAL.]
"MATT. MULLIGAN, [SEAL.]
"F. T. CALEY. [SEAL.]"

The assignee, appellant, went into immediate possession and with reasonable diligence and skill mined the demised

Where there is a breach by one party of a running contract the other party need not wait until the end of the time limit but may sue at once for his entire damages. *Id.*

Failure to receive ore to the full stipulated daily deliveries gives the purchaser the right to buy elsewhere and charge the excess to the seller and justifies determination of the contract. Acceptance of lots less than called for does not authorize continued tender of short lots. *U. S. Iron Co.* v. *Sloss-Sheffield Co.* 71 N. J. L. 1; 58 Atl. 173.

A contract to supply clay "suitable for the manufacture of cement" is not complied with by delivery of certain clay which by mixing with other clay could be made into cement. *Coburn* v. *California Co.* 144 Cal. 81; 77 Pac. 771.

[2]*Colorado Fuel Co.* v. *Pryor*, 19 M. R. 544.

premises until December 19, 1895, when he stopped operations and sold the mining machinery and tools and rights in the sublease to one Wolcott, who had become assignee of the original lease. Wolcott paid appellant for the machinery, tools and assignment $2,500, and agreed as a further consideration to pay appellees whatever sum—not exceeding $1,500—he might realize net from the operation of the mine. He worked the property during the remainder of the term of the sublease without net returns. Appellant during the four months he worked the property lost several thousand dollars in his operations.

There was no evidence that the property covered by the sublease could have been operated at a profit had it been mined with reasonable diligence and skill during the life of the sublease assigned to appellant. There was affirmative evidence that even though so mined the operations would not have been at a profit. Two days after the expiration of the sublease—assigned as stated to appellant, and by him to Wolcott—appellees sued appellant for the $1,500, nominated in above agreement of August 20.

From the foregoing facts it appears that appellant operated this property with skill and diligence during four months in his effort to secure net returns at a loss of several thousand dollars. He then, about seven weeks before the expiration of the sublease, quit work, and assigned his interest therein to Wolcott, who, during the remainder of the term continued to work the property with skill and diligence, resulting in failure to obtain net proceeds.

Appellees constructed their complaint, tried the case below and secured judgment for the full amount claimed upon the theory that appellant, by assigning the contract on December 19, violated it in that he put it out of his power to comply with the contract, and thereby became liable absolutely for the $1,500, stipulated to be paid out of the net proceeds of the mine.

This theory is relied on here to sustain the judgment below. This contention in practical results amounts to this: Although appellant had reasonably shown by mining the leased property during four months of the sublease that it could not be operated at a profit; that further operations would be attended with further loss to him, and no benefit to appellees, and although it appeared that appellees were not in any degree damaged by his cessation of work, yet, by his merely stopping work and assigning the sublease, he was liable to appellees in the sum of $1,500, damages they never sustained. We think such is not the law. The principle upon which damages are awarded in actions for breach of contract is that of compensation to the injured party. A reasonable construction must be put upon the contract of August 20, between appellant and appellees, and it was so construed at the former hearing in *Caley* v. *Portland,* 12 Colo. App. 397, 56 Pac. 350, the court saying:

"The words, 'The said F. T. Caley agreeing to work said claim,' do not call for continuous working. All that they did require was a reasonable amount of work with reference to the object to be attained, to wit, the extraction at a profit of ores from the territory."

C. F. & I. Company v. *Pryor,* 25 Colo. 540, 549, 550, is pertinent. There the premises were demised for coal mining purposes, and the lessee covenanted to work the same. This it failed to do. The lessor sued and recovered damages upon the alleged breach of the contract to operate the mine. The judgment was reversed because the evidence failed to show that the mine could have been worked at a profit. The court *inter alia* said:

"By the transaction the lessor expected to receive compensation in the way of royalty, and the lessee profits from the operation of the leased premises as a coal mine; so that the benefits thus realized would be mutual. Unless coal was found of a merchantable grade which could be produced at a

reasonable profit, or if that discovered was valueless, to require the lessee to mine it and pay royalty on the production would impose a burden without any benefits in return. The obligation was imposed upon the lessee to open the premises as a coal mine, and operate them as such, but in the absence of an express provision in the lease regarding what conditions should exist before a penalty would attach for a failure to observe this obligation, or under what circumstances it should comply with this provision, the law presumes that the parties to the lease, at the time of its execution, considered the purpose for which it was executed and the conditions under which it would be mutually beneficial to carry out its terms and provisions, and, therefore, intended by the language employed to contract accordingly. 2 Parsons on Contracts, *499. The right to mine having been granted, the law implies that the lessee should exercise reasonable diligence in working the mine—*Koch's Appeal,* 93 Pa. St. 434; but unless coal actually existed on the premises of a merchantable grade which could be produced at a reasonable profit, or, if none existed, or that which was found was valueless, then, under this contract of lease it would be under no such obligation."

Under these authorities appellant was not required to work the leased property continuously, but to make a reasonable effort to mine it at a profit. Having made such effort, and having reasonably shown that it could not be worked at a profit within the life of his sublease at the time he quit work and made the assignment he had satisfied the requirements of the contract, and hence was not liable in damages for the cessation of work or assignment of the contract. Further, as the only alleged breach of the contract relied on for recovery is the assignment of the sublease by appellant to Wolcott, if the contract was assignable no breach of the contract was proven and the case must be reversed. This point was ruled

in *Caley* v. *Portland, supra.* The court in speaking of the assignment of the sublease on August 20, said:

"The assignment contained no provision against subletting, and there was nothing in it nor the character of the work to be performed to indicate that the contract of assignment involved any relation of personal confidence such as to justify the conclusion that there was an intention of the parties that the work should be performed only by the defendant (Caley). Covenants against underletting are not to be presumed; in fact, they are not favorably regarded by the courts, and are construed liberally in favor of the lessee. Wood's Landlord and Tenant, § 321."

While such portion of the opinion was perhaps not essential to a decision of the point upon which the case turned, yet, it expressed the law. We think the contract was assignable; if so, its terms were not violated in making the assignment by appellant to Wolcott.

The judgment should be reversed.

Reversed.

GEORGE B. UPTON ET AL. v. ALBERT WEISLING.

(71 Pacific 917. Supreme Court of Arizona. March 20, 1903.)

[1]**Sufficiency of complaint for relief against fraudulent sale considered** and the same held to state a good cause of action.

Mere expressions of opinion by the trial court cannot be considered as parcel of its judicial findings.

Stock issued to part of the co-owners. Where co-owners between whom existed relations of trust and confidence agree to a sale to a company, stock in which is issued to one and not to another, the stock issue being concealed and the money price received stated to be the full consideration, the defrauded party is entitled to his proportionate share of such stock.

[2]**Mere knowledge of a fraud** without participation therein or sharing its profits is not sufficient to hold a party to a judgment for any share of such profits.

Appeal from District Court, Yavapai County; before Justice SLOAN.

[1]*Barnard* v. *Roane Co.* 17 M. R. 94.

[2]Concealment of knowledge which buyer had the right to have. *Edelman* v. *Latshaw*, 18 M. R. 608.

It is not fraud to lend money to enable entries to be made under the Timber and Stone Act, on the expectation of the lender that it will become the ultimate holder of the title. *U. S.* v. *Detroit Co.* 124 Fed. 393.

Held, on the facts no fraud that the buyer concealed from the seller the fact that he had already given an option on the mining interest for a much larger sum than the price paid. *Lake* v. *Owens* (Cal.) 79 Pac. 589.

Where an agent buys a mine for less than the price reported to his principals he is liable for the difference to his principals in assumpsit. *Humbird* v. *Davis*, 210 Pa. 311; 59 Atl. 1082.

Statements as to the value held not mere expression of opinion where they amount to an artifice to prevent investigation. *Garr* v. *Alden*, —Mich.—; 102 N. W. 950.

Vendee bringing suit to recover commissions wrongfully paid by his vendor to the agent does not operate to ratify the contract so as to release the vendor from damages arising out of his fraud. *Barnsdall* v. *O'Day*, 134 Fed. 828.

Action by Albert Weisling against George B. Upton and others. From a judgment in favor of plaintiff, defendants appeal. Modified.

HERNDON & NORRIS and FRANK W. ELLIS, for appellants.

ROBT. E. MORRISON and JOHN H. COLLINS, for appellee.

DAVIS, J. On the 30th day of April, 1901, Albert Weisling commenced an action in the district court of Yavapai county against George B. Upton, Ben Hatfield, Garrett E. Lamb, and the Oro Grande Mining Company. His amended complaint, covering many pages of the transcript, sets forth, in substance:

An agreement alleged to have been entered into between the plaintiff and the defendants George B. Upton and Ben Hatfield on or about September 20, 1900, by which the three were to become associated in the location, development, and sale of mining properties; that by the terms of said agreement such properties were to be acquired jointly by the said Upton, Hatfield, and the plaintiff, and all were to share equally therein, and in the benefits, profits, and losses of the venture; that in pursuance of their said agreement the said parties located and became co-owners of six certain mining claims, situate in the Black Rock mining district in Yavapai county; that the plaintiff was ignorant and inexperienced in the business of selling mines, and without knowledge of the value of mines, but that the said Upton was a person of great skill, knowledge, and experience in mining, and as a dealer in mining properties; that the plaintiff fully trusted and relied upon his associates, Upton and Hatfield, and believed that they would, in all things connected with said enterprise, regard and protect his interests equally with their own, and that no unfair advantage would be taken of him by either of them; that the said Upton and Hatfield, contriving and intending

to injure, cheat and defraud the plaintiff, and to deprive him of his just share in the value of the aforesaid mining claims, unlawfully, and in violation of their duty to the plaintiff, and of the trust and confidence reposed by him in them, artfully concealed from him certain material facts relating to the value of said properties, and their own purposes concerning the development and sale thereof, to the end that the plaintiff might be induced to part with his interest in said property for a grossly inadequate consideration; that, through the influence and persuasion of Upton and Hatfield, the plaintiff was induced to authorize and consent to a sale of all of the aforesaid mining claims at the price of $10,000; that no sale, however, was effected on this basis; that the plaintiff was informed by the said Upton and Hatfield that the defendant Garrett E. Lamb, a resident of Iowa, was considering the purchase of said properties, but would not agree to pay more than the sum of $8,000 for the same; that no better price than this could be obtained from any source, and that they were willing and anxious to sell at this price; that the plaintiff, being ignorant of the real and prospective value of said properties, and relying upon the friendship, superior judgment, and good faith of his associates, Upton and Hatfield, consented that said properties might be sold to said Lamb for the sum of $8,000, the proceeds to be equally divided between the three owners; that, in pursuance of a pretended agreement of sale on these terms, the plaintiff, on January 3, 1901, executed to the said Lamb a bond or option on plaintiff's one-third interest in the said mining claims at the price of $2,666, and simultaneously therewith executed a deed therefor, and deposited the same in escrow; that on March 18, 1901, the said Lamb, in compliance with the option agreement, paid to the plaintiff the sum of $2,666, took said deed out of escrow, and placed it of record.

The complaint further sets forth that, notwithstanding their representations to the contrary, the said defendants

Upton and Hatfield did not sell or dispose of their interest in said mining claims, but that they are still part owners therein; that their pretense of selling was in furtherance of a formed design and fraudulent purpose to deceive and defraud the plaintiff, and to secure to themselves and to the said Lamb the plaintiff's interest in said property; that, at the time and prior to the execution of the option and deed by the plaintiff, the said mining claims were worth in excess of $2,000,000; that the defendants Upton and Hatfield then knew that such was their value; that the defendant Lamb was a party to, and cognizant of, all the fraudulent acts, misrepresentations, and deceit done, said, and practiced by Upton and Hatfield against the rights and property of the plaintiff, and that all three of said defendants were acting in collusion to cheat and defraud the plaintiff of valuable property, and to obtain the same for a ridiculously small and grossly inadequate consideration; that, solely by reason of the fraud, deceit, collusion, and wrongs of the defendants Upton, Hatfield, and Lamb, the plaintiff was induced as aforesaid to convey away his interest in said mining claims; that the Oro Grande Mining Company, through its agents and officers, assert some right or title to said properties, and, in conjunction with its codefendants herein, works, operates, and controls the same. The plaintiff, offering to return the $2,666 received as a consideration for said conveyance, and to do all manner of equity required of him, prayed judgment for the rescission or cancellation of the deed executed by him for said mining claims, and that he be restored to his one-third interest therein. He also asked for such other and further relief as he might in law or equity be entitled to.

The defendants George B. Upton and Ben Hatfield, by their answer, denied generally and specifically all allegations of said complaint which charged them with any fraud, deceit, collusion, or wrongdoing against the plaintiff. The defendant Garrett E. Lamb interposed, and urged a general de-

murrer to the complaint, which was overruled. There was also filed in his behalf a separate answer, which contains specific denials of all averments of the complaint in any way imputing to him fraudulent collusion with Upton and Hatfield, or charging him with fraudulent conduct against the plaintiff.

There was a separate answer by the Oro Grande Mining Company, asserting full title to said mining property derived by purchase in good faith. The evidence at the trial tended to establish, among other things, that on January 3, 1901, when the plaintiff, Weisling, executed his option and deed for the sale of his one-third interest in said mining claims to Lamb at the price of $2,666, the defendants Upton and Hatfield had already entered into an option agreement with Lamb, by the terms of which they were to receive, as consideration for the transfer of their two-thirds interest, the sum of $5,333, and, in addition thereto, one-third of the capital stock of a corporation to be organized for the purpose of taking over the title to said mining properties and developing the same; that thereafter the said Upton and Hatfield received from Lamb the said sum of $5,333, and made a deed of their said interest to him, as trustee; that Lamb thereupon caused to be organized the Oro Grande Mining Company, a corporation with a capital stock of $60,000, and deeded to said company the aforesaid mining claims; that $20,000 of the capital stock of said company was delivered to Upton and Hatfield, in compliance with their agreement with Lamb. The court below, in its judgment, did not grant the plaintiff relief to the extent of ordering a rescission of the deed executed by him to Lamb, but entered a decree requiring the defendants, Upton, Hatfield, and Lamb, to deposit in court for the plaintiff's benefit one-third of $20,000 of the capital stock of the Oro Grande Mining Company, or, in default thereof, that the plaintiff recover judgment against them for the face value of the said stock.

The case was ordered dismissed as to the defendant company. The defendants Upton, Hatfield, and Lamb have taken an appeal from the judgment and decree so entered.

The first assignment of error is made in behalf of Lamb alone, and is based upon the overruling of his demurrer to the complaint. It is claimed that, as to this defendant, the allegations of fraud made by the complaint are too general, and only averments of legal conclusions. We think that counsel have misconceived the scope and effect of the complaint as it relates to the defendant Lamb. Clearly, there is a direct and concise statement of the facts connecting him with all the misrepresentations and deceit alleged in the complaint against Upton and Hatfield. It is sufficient if the main facts or incidents which constitute the fraud against which relief is desired shall be fairly stated, so as to put the defendant upon his guard and apprise him of what answer may be required of him. Story, Eq. Pl. § 252.

It is claimed that the court erred in its findings of fact, but the alleged findings upon which error is sought to be predicated are mere expressions taken from the trial court's opinion, and not the findings of fact which were signed by the judge and became the basis of the judgment. These latter are contained in the record, but, through some inadvertence, appear to have escaped the attention of counsel for appellants. They show that, upon the material and disputed points in the case, the trial court found as follows:

"That on or about the 3d day of January, 1901, plaintiff herein executed an option to the defendant Garrett E. Lamb, granting the said Garrett E. Lamb therein the right to purchase his one-third interest in and to said property for the sum of $2,666, and at the same time executed a deed to said one-third interest in and to said property to said defendant Garrett E. Lamb, and deposited the same in escrow to be delivered to said Lamb in the event that the latter should pay to plaintiff the purchase price in said option named, to wit, the sum of $2,666. That prior to said 3d day of January, 1901, and prior to the execution of said option and deed, said plain-

tiff authorized defendant George B. Upton to negotiate a sale of said property upon the agreed price of $10,000 for the whole thereof. That, at the time of the execution of said option and deed, defendants Upton and Hatfield represented to plaintiff that they were willing and desirous of selling the property herein described for the sum of $8,000, and that the defendant Garrett E. Lamb was willing to purchase the same for said sum of $8,000, and that no further sum would be paid by said Lamb for said property, but that the said sum of $8,000 was all that could be had for the same. That plaintiff herein was induced and persuaded to give said option, and to execute said deed for the sum of $2,666, by reason of said representations, so made as aforesaid by said Upton and Hatfield, that the sum of $8,000 was the full purchase price of said property, and that no greater or further sum or sums could be had from the purchaser, said Garrett E. Lamb. That subsequently, and on the 18th day of March, 1901, said defendant Garrett E. Lamb paid to the plaintiff herein the said sum of $2,666, and obtained the said deed, placed as aforesaid in escrow, and had the same recorded in the office of the county recorder of said county. That prior to the execution by plaintiff to said Lamb of said option and deed, the defendants Upton and Hatfield had entered into an agreement with said defendant Lamb, wherein it was agreed that said defendants Upton and Hatfield should convey to a corporation thereafter to be formed all their right, title, and interest in and to said property, in consideration of the sum of $2,666 to be paid to each of said defendants, and in addition thereto were to receive one-third of the capital stock of said corporation. That, in compliance with the said agreement, said defendant Garrett E. Lamb did thereafterwards pay to said Upton and to said Hatfield the sum of $2,666 each, and did thereafterwards cause to be organized a corporation known as the 'Oro Grande Mining Company,' with a capital stock of $60,000, and did thereafterwards cause to be issued to said Upton and to said Hatfield as a further consideration for said conveyance, the sum of $20,000 of the capital stock of said Oro Grande Mining Company, fully paid. That at the time plaintiff gave his said option and deed to said defendant Lamb, he did not know that said Upton and Hatfield were to receive any other consideration for their conveyance of their interests in said property than the money consideration hereinbefore set forth, nor did he, at the time when said defendant Garrett E. Lamb paid the plaintiff the purchase price agreed upon for plaintiff's interest, have any knowledge that said Upton and Hatfield were to receive any other or different consideration than said money consideration hereinbefore set forth. That by reason of said concealment by said Upton and said Hatfield of the fact that they were to receive any additional consideration than said money

consideration for said conveyance of their said interests, and by reason of the actual representations made to said plaintiff by said Upton and Hatfield that the full purchase price for the entire property was to be the sum of $8,000, and that no further sum or sums could be had therefor from said Lamb, the said plaintiff was persuaded, induced, and influenced to reduce the selling price of his one-third interest in and to said property from the sum of $3,333.33 to the said sum of $2,666. That the said Garrett E. Lamb knew at the time of the execution of said option and deed, and at the time of the completion of the purchase of plaintiff's one-third interest, of said concealment and misrepresentations on the part of said Upton and Hatfield. The court further finds that no other or further wrong, deceit, concealment, or misrepresentation was practiced upon said plaintiff by any of the defendants herein than that above found. The court further finds that there are stockholders of the Oro Grande Mining Company, one of the defendants herein, who had no knowledge of the concealment, deceit, and misrepresentations hereinbefore set forth."

All of the above findings were based upon the evidence presented at the trial, and we think that no one of them is subject to the objection that it is not fairly sustained by proofs.

It is further urged that the judgment as rendered is not supported either by the evidence or the findings, and particularly that the state of the case did not warrant any judgment against the defendant Lamb. The evidence did not sustain all of the allegations of fraud which the complaint contained, and it is to be observed that the trial court only declared, by its finding, that misrepresentation and concealment had been practiced by the defendants in relation to the price which could be obtained for the joint property. It is clear to us from the evidence that the relations between the plaintiff and his co-owners were such as required of them full disclosure of all the facts pertaining to the consideration for the proposed sale. These relations were of a mutual and confidential character, and the plaintiff was relying and acting altogether upon the good faith of his two associates. Their status was not that of parties dealing with a third "at arm's length."

So that we have no hesitancy in saying that the plaintiff, having been induced by the defendants Upton and Hatfield to part with his interest in the joint property upon their representation that the price of $8,000 was to be obtained for the whole thereof, it was right and equitable that he should be decreed to have his proportionate share of the $20,000 stock received as consideration by said defendants in excess of that sum. But, while approving the judgment of the court below in so far as it relates to the defendants Upton and Hatfield, we do not think there is justification, either in the evidence or the findings of the court, for subjecting the defendant Lamb to the terms imposed against Upton and Hatfield. As the purchaser, his relation to the transaction was different from theirs, and the duty which he owed to the plaintiff dissimilar. The finding was merely that he had knowledge of the misrepresentation and concealment on the part of Upton and Hatfield concerning the purchase price. The court did not find that he participated in the deception. It does not appear that the fraud practiced upon the plaintiff by Upton and Hatfield enabled Lamb to get the property at any better price, or that he was in any wise benefited thereby. Not having received any portion of the $20,000 stock, he could not surrender the same, and we think there was error in making him subject to the provisions of the decree.

The judgment will be modified to the extent of relieving the defendant Lamb from its operation, and in all other respects will be affirmed.

KENT, C. J., and DOAN, J., concur.

GIOVANNI LAVAGNINO v. EDMUND H. UHLIG ET AL.

(26 Utah 1; 71 Pac. 1046. Supreme Court. April 4, 1903.)

The special act forbidding land office employees to purchase public land is not repealed by the general terms of the Mining Acts where the mineral lands are declared open to all citizens.

The decisions of the land department, though not binding as precedents, should not be overruled where not clearly erroneous.

Location by U. S. surveyor. The act forbidding acquisition of title by such employees covers the case of a deputy U. S. mineral surveyor and his location of a mining claim is therefore void and his conveyance of such claim passes no title.

After the expiration of the period of publication it is conclusively presumed that one who fails to file his adverse claim has no title.

[1]**Right of possession.** Adverse claim proceedings are not intended to determine the rights of contestants to a patent but to determine their right to possession of the disputed ground.

Cannot rely on rights of third parties. Where plaintiff, in an action to determine the right of possession to a disputed mining claim, fails to show in chief, any right to the claim, he becomes a stranger to the title, and cannot avail himself of any rights a third party may have had to the claim, where such third party has failed to file an adverse within the prescribed time.

[2]**Statute of limitations.** A party who allows himself to be kept out of possession of a mining claim for seven years, the period barring action for recovery of real estate, loses his title to the same under the provisions of Rev. Stat. U. S. § 2332.

Text case affirmed 198 U. S. 443.

[1]Where adverse claimant instead of bringing suit files notice that action is already pending, brought by the applicant, such suit stands to support the adverse and plaintiff cannot dismiss without trial. *Axiom M. Co.* v. *Little*, 6 S. Dak. 438; 61 N. W. 441.

Suit in support of does not require either party to make out complete case for patent. *Doe* v. *Waterloo Co.* 18 M. R. 265.

In such action plaintiff must establish a right good against the United States. *Schultz* v. *Allyn*, 18 M. R. 649.

Ordinary complaint in ejectment will support adverse claim and it may be amended after the 30 days. *Deeney* v. *Mineral Creek Co.* 22 M. R. 47; *Woody* v. *Hinds*, 30 Mont. 189; 76 Pac. 1. Mining Rights, 12th Ed. 458. *Contra*, *Keppler* v. *Becker* (Ariz.) 80 Pac. 334.

[2]Complaint alleging title under statute of limitations is good. *Glacier Co.* v. *Willis*, 17 M. R. 127

Appeal from District Court, Salt Lake County; W. C. HALL, Judge.

Action by Giovanni Lavagnino against Edmund H. Uhlig and another to determine the rights of possession of portions of certain mining claims. Decree for defendants, and plaintiff appeals. Affirmed.

The defendants, Edmund H. Uhlig and Alex McKernan, on or about the 24th day of August, 1898, made an application in the United States land office at Salt Lake City for a patent for the Uhlig No. 1 and Uhlig No. 2 mining claims. The plaintiff in due time filed in the said land office an adverse claim to a portion of the said Uhlig No. 1 and No. 2, which overlapped and included a part of the Yes You Do mining claim. Thereupon further proceedings on said application were stayed in the land office, and the plaintiff in

Construction of the clause as to patenting on possession for the period of the statute of limitations. *McCowan* v. *McLay*, 16 Mont. 234; 40 Pac. 602.

Adverse possession during the statutory period gives title equivalent to location. *Altoona Co.* v. *Integral Co.* 18 M. R. 410.

Failure to record within sixty days after discovery where the adverse party did not claim any rights acquired between the expiration of the sixty days and the date of filing. *Columbia Co.* v. *Duchess Co.* 13 Wyo. 244; 79 Pac. 385.

A suit supporting an adverse claim is a suit in aid of a statutory proceeding and not a suit at law nor in equity. Complaint held to state no cause of action because it failed to allege that "the ground in controversy was mineral land and subject to location." *Keppler* v. *Becker* (Ariz.) 80 Pac. 334.

Where plaintiff fails to prove title to the property and is nonsuited, he has no further standing in court, and the defendant can then prove his title *ex parte*. *Moffat* v. *Blue River Co.* 33 Colo. 142, 80 Pac. 139.

A suit supporting is not one of federal jurisdiction, regardless of citizenship. *Willit* v. *Baker*, 133 Fed. 937.

Where his co-tenants convey to plaintiff their interest in the claim he may bring the suit in his own name alone. *Id.*

due time instituted this action to determine, as provided in section 2326 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1430], the right to the possession of the portion of the Uhlig Nos. 1 and 2 which conflicts with the Yes You Do.

It appears from the record that the summons in respect to the defendant Alex McKernan was quashed, and the action as to him was discontinued; that, pending the action, which was not dismissed as to the co-defendant Edmund H. Uhlig, and before the trial, he conveyed his interest in the Uhlig Nos. 1 and 2 to the St. Joe Mining Company, a corporation organized under the laws of the state of Utah, and said company was substituted as defendant in place of the said Edmund H. Uhlig. The trial court adjudged and decreed that the St. Joe Mining Company and the said Alex McKernan are the owners in possession, and entitled to the possession, except as against the paramount title of the United States, of the premises in dispute (which was described in the decree by metes and bounds), and that the defendant recover its costs, etc. From this decree the plaintiff has taken an appeal.

It appears from the testimony of J. Fewson Smith, Jr., a witness for the plaintiff, that he located the Yes You Do on the 1st day of January, 1898; that at that time, and at the time of the trial, he was a deputy United States mineral surveyor "attached to the office of the surveyor general of the district of Utah;" that he had an interest in the litigation; that, between the time of making said location and the time of filing the protest in the land office by the plaintiff, he agreed with plaintiff to convey to him the Yes You Do mining claim for the consideration of $1, and the sum of $600, the future payment of which depended upon the conditional stipulations, the substance of which is as follows: If a patent for said claim should be obtained without litigation, Lavagnino, the plaintiff, was to pay $600, but if there was litigation through any source in respect to said claim, and a

failure to procure patent for the same, then no part of the $600 was to be paid for the conveyance. In case there was such litigation, then the said Smith was only to be paid said sum less the expense of patenting the claim, if one should be obtained; but if a patent was only obtained for a small triangle, or part of the claim, the plaintiff might refuse to pay the remainder of the consideration. In pursuance of the foregoing agreement, the claim was deeded to the said plaintiff by Smith, but the only consideration named therein was the sum of $1. The said Smith also testified that "when he transferred the ground to Lavagnino it was for the purpose of defeating these other claims, and not with a view of making much;" and, having further testified that he made the plat showing the conflict in question in this case, he was asked, on cross-examination, the following question: "Isn't it a fact that you, being a deputy United States mineral surveyor, couldn't make the survey and protest for your claim if you held it in your own name, and you consequently turned it over to Mr. Lavagnino? A. It is a fact that I couldn't make the protest in my own name while I held an interest in the claim."

After the disclosure of the foregoing facts, the plaintiff offered in evidence a certified copy of the location notice of the Yes You Do, and in connection therewith the deed to Lavagnino. To this offer the defendant objected upon the grounds, which, in substance, were as follows: That by the testimony of the witness J. Fewson Smith, Jr., it appears that said mining claim was not located by a person who had the power, under the act of congress, to locate mineral ground, it appearing from the testimony of the witness that he was at the time mentioned—January 1, 1898—a deputy United States mineral surveyor for Utah, and therefore incompetent to make locations; that in this particular action it now appears that the witness, at the time he made the protest map, plat, and the survey fixing the boundaries for the

purpose of an adverse claim and protest introduced in the land office, was himself a deputy United States mineral surveyor, interested in the action, as he himself has stated; therefore the location itself was in violation of the law, and could not be the basis either of a valid location in himself or a deed to anybody.

The trial court excluded the said notice and deed on the ground that "J. Fewson Smith, Jr., the locator of the claim, was prohibited from making the location of a lode mining claim, and, therefore, had not the qualifications to initiate any title by any act that he did with reference to locating the Yes You Do mining claim." The plaintiff, after duly excepting to the ruling of the court, rested. The defendant then proceeded to introduce evidence in support of the validity of the Uhlig Nos. 1 and 2 mining claims, after which, in rebuttal, the plaintiff offered to show that the "Levi P." and "Veta" mining claims at the time of the location of the Uhlig Nos. 1 and 2, were valid and subsisting claims, and covered the discoveries of both the Uhlig No. 1 and No. 2, and were then owned by Andrew P. Mayberry. Mr. Sonnedecker, an attorney of the plaintiff, offered to make the same showing "on behalf of the government and as a friend of the court." Defendant's counsel objected to this on the ground that it was immaterial; "that the court was without jurisdiction to listen to and decide an issue of that kind, the United States not being before the court in that sense." The trial court sustained the objection on the ground that, as no adverse claim based upon the "Levi P." and "Veta" claims had been made within the prescribed period, whatever rights the parties may have had to said claims were waived by failure to properly adverse the application for a patent by the defendant.

It does not appear from the record that any adverse claim whatever, based upon the Levi P. or Veta, was made in the land office in the matter of the defendant's application for a

patent of the Uhlig Nos. 1 and 2, nor does the plaintiff claim any interest in said mining claims.

N. W. SONNEDECKER (CHARLES C. DEY, of counsel), for appellant.

PIERCE, CRITCHLOW & BARRETTE, D. H. WENGER, and BROWN & HENDERSON, for respondents.

After stating the facts, BASKIN, C. J., delivered the opinion of the court.

1. The refusal to permit the certified copy of the location notice of the Yes You Do, and the deed offered in connection therewith, to be introduced in evidence, and the rejection of the evidence relating to the Levi P. and Veta mining claims, is assigned as error.

Section 452, Rev. St. U. S. [U. S. Comp. St. 1901, p. 257], provides:

"The officers, clerks, and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office."

Subsequent to the enactment of this section, section 2319, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1424], was passed, and is as follows:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are not inconsistent with the laws of the United States."

The former section has been retained in all of the revisions

of said statutes made since its enactment. These sections are therefore *in pari materia,* and must be construed together, and, if possible, made to harmonize, and not to violate, the general public policy which it is evident the former was enacted to prevent. 1 Kent, Comm. (13th Ed.) p. 464; *Manuel* v. *Manuel,* 13 Ohio St. 458, 464, 465. The presumption is that congress, when the latter section was passed, was aware of the existence of the former, and acted in view of that fact. As the former section has not in terms been repealed, but has been retained in each of the revised editions of the United States statutes, it must be presumed that congress intended it to remain in full force, notwithstanding the provisions of the latter section; or, in other words, it was the intention of congress to prohibit, on the ground of public policy, the officers, clerks, and employees in the general land office, from acquiring, directly or indirectly, an interest in the purchase from the government of any of the public land of the United States.

It is clear from the testimony of J. Fewson Smith, Jr., in this case, that his right to the unpaid consideration for the conveyance of the Yes You Do was wholly dependent upon the purchase or entry of the same, and to that extent he was interested in the entry—or in the purchase, which is the same as an interest in the entry—sought by Lavagnino. One dollar is the only consideration actually paid by Lavagnino to Smith. Both of the parties at the time anticipated litigation. Smith, in addition to his testimony before referred to, stated: "Somebody would have to stand the expense of the litigation if there was any, and, since I could not make a sale to Mr. Lavagnino out and out, I just let him take it at his own terms, with the understanding that if the claim was given to him clear, that is, if there was litigation through any source, and he got the claim through for patent clear, then I was to receive, in addition to what I got that day, a certain sum of money. This arrangement was in 1898, between the

time of making the location and the time of entering the protest. It would be somewhere about the middle of the summer, I should think. I received $1 in cash. That was to bind the bargain. If he doesn't get the ground, I get nothing further."

Before making the adverse claim and bringing this suit, Lavagnino knew that Smith was a deputy United States mineral surveyor, for Smith, as such, made the survey and plat filed in the land office with the adverse claim; so that, if section 452 includes deputy mineral surveyors, Lavagnino, before expending any sum except $1, was at that time advised of the fact, if he was not before, that his agreement with Smith was in violation of the provisions of said section, and that the conveyance of the Yes You Do for that reason was invalid. The latest decisions of the secretary of the interior hold that under section 452, Rev. St. U. S., "a deputy mineral surveyor, while holding such office, is disqualified as a mineral entryman." *Floyd* v. *Montgomery,* 26 Land Dec. 122; *Frank A. Maxwell,* 29 Land Dec. Dept. Int. 76. Our attention has not been called to any decision of a court touching the question, and while the decisions of the land department, on matters of law, are not binding upon the courts, they should not be overruled except when they are clearly erroneous. *Hastings & Co.* v. *Whitney,* 132 U. S. 357, 366, 10 Sup. Ct. 112, 33 L. Ed. 363, and the cases there cited. We think that the section in question includes mineral surveyors, and prohibits them, as held by the land department, from entering any of the public lands while they are such deputies, and also from directly or indirectly acquiring any interest in the purchase from the government of the same. It follows that J. Fewson Smith, Jr., while he was a deputy mineral surveyor, was prohibited by said section from entering a mining claim or directly or indirectly acquiring any right or interest in the purchase from the government of such a claim. He was also prohibited at that time from

doing any of the acts upon the performance of which, under the provisions of the mining law of 1872, the right of making an entry or purchase from the government depends, and that his location of the Yes You Do was therefore void, and Lavagnino acquired no rights under the deed to him of the same.

The failure of the plaintiff to show, in chief, any right to the premises in controversy, disclosed the fact that he was "a stranger to the title" of the premises in dispute, and that a nonsuit could, on motion, have been properly granted. So that a failure to establish the defendants' claim could in no way benefit him or validate his alleged title to the Yes You Do. Therefore the plaintiff had no more interest in or right to further contest the defendants' claim, on the ground that the Levi P. and Veta were valid and subsisting claims, than the said Andrew P. Mayberry himself or any other stranger had.

Section 2325, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1429], provides that:

"If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

In the case of the *Eureka M. Co.* v. *Richmond Co.* 4 Sawy. 302, Fed. Cas. No. 4,548, it was held, in the opinion delivered by Mr. Justice Field, that "under the mining act of 1872, where one is seeking a patent for his mining location, and gives the prescribed notice, any other claimant of an unpatented location objecting to the patent on account of extent or form, or because of asserted prior location, must come forward with his objections and present them, or he will

be afterwards precluded from objecting to the issue of the patent." The rule thus laid down has been adhered to ever since its announcement, both by the courts and the land department.

In the case of *Wight* v. *Dubois* (C. C.) 21 Fed. 693-696, Mr. Justice Brewer, in the opinion, summed up the propositions decided therein as follows: "First, the government, as a landowner, offers its lands for sale upon certain prescribed conditions, compliance with which is a matter of settlement between the owner and purchaser alone, and with which no stranger to the title can interfere. Second, publication of notice is process bringing all adverse claimants into court, and if no adverse claims are presented it is conclusively presumed that none exist, and that no third parties have any rights or equities in the land. Third, thereafter the only right or privilege remaining to any third parties is that of protest or objection filed with the land department, and cognizable there only."

In *Golden Reward M. Co.* v. *Buxton M. Co.* (C. C.) 79 Fed. 868-874, the same distinguished judge, after quoting section 2325 of the Revised Statutes, said: "The expression 'it shall be assumed' must be construed to mean 'conclusively assumed,' as any other construction would defeat the object of the statute."

In *Burnside* v. *O'Connor,* 30 Land Dec. 67-70, Secretary Hitchcock, after quoting the same section, said: "The Hibernia having failed to file an adverse claim against the Mary Navin during the latter's period of publication, it must be assumed that no such adverse claim exists, and the department cannot now hear any objection from the Hibernia claimants to the issuance of patent for the Mary Navin, based merely on an assertion of prior right to a portion of the land included in the Mary Navin entry. The provisions of the statute are clear, and as the Hibernia claimants have, by their own negligence, placed themselves in such a position

relative to the Mary Navin application that it must be assumed they have no adverse claim against said application, it is useless to suspend the Mary Navin entry to await the result of the suit by the Mary Navin against the Hibernia."

In *Branagan* v. *Dulaney*, 2 Land Dec. 744, Secretary Teller said: "It has been the practice of the land office not to inquire as to the status of the original or prior location when the discovery is made within the boundaries thereof, unless an application for patent has been made for such original or prior location. If the owner of the original or prior location neglects to adverse the application for a patent to the junior location, it must be assumed, under the provisions of section 2325 of the Revised Statutes, that the claimant of such junior location is entitled to a patent as against the claims of the prior locator."

In the matter of the *Nevada Lode,* 16 Land Dec. 532, it was held that "a charge of noncompliance with law against a mineral entry made by a protestant may properly form the basis of a hearing, but the protestant in such a case is not entitled to set up his own claim to the land."

In *American Cons. M. & M. Co.* v. *De Witt,* 26 Land Dec. 580, it appears that De Witt made application for a patent for the Maryland mining claim, and that the American Company afterwards protested, and one of the grounds of the protest was that the "Maryland was not a valid location, in that the discovery therein was on the Orbit claim, a prior and subsisting location, and not upon unappropriated public land; that the Orbit vein was the only one discovered within the limits of the Maryland." Secretary Bliss, in ruling adversely to the protestant, said: "Whether the ground which includes the Maryland discovery is a part of the Maryland, or a part of the Orbit, and whether the Maryland is the superior claim to the ground in conflict, are questions which were open to determination by adverse proceedings in the local courts, and which are now determined adversely to

protestant's contention, by reason of its failure to adverse the Maryland's application (section 2325)."

The evident intention of the adverse proceedings authorized by section 2326 of the Revised Statutes [U. S. Comp. St. 1901, p. 1430] is not to determine any of the rights of the United States, or the rights of the contestants to a patent, but, in aid of and for the information of the land department, to determine, as between the litigants, the right to the possession of the mining claim in dispute.

In *Doe* v *Waterloo M. Co.* 17 C. C. A. 190, 70 Fed. 455-462, after quoting section 2326 of the Revised Statutes, the court said: "There is no authority in the statute to find against the United States, and that the party so establishing title is entitled to a patent from the United States. The United States is not named as a party. The suit does not purport to be one against the United States. No authority is given by the statute to sue the United States in such a matter. The application for a patent for mineral land is made to the land department of the United States. Ultimately that department must determine the right to the patent. The trial of the right to the possession of a given tract of mineral land is a proceeding in aid of that department. It was not intended that when this issue was presented to a court it should operate as a transfer of the whole case made by the application, and that thereafter the land department would have nothing to do but to carry into effect the judgment of the court. A state court of general jurisdiction has the power to determine this issue, and such courts are often called upon to try causes arising under the said section 2326. Can it be supposed that it was intended that under the said statute such a court would have the power to determine whether or not the United States should issue a patent to any applicants? The power to sue the United States in a state court should rest upon some positive statute. It cannot be inferred from such a statute as the one in ques-

tion." To the same effect see *Wight* v. *Dubois* (C. C.) 21 Fed. 694.

We think it is clear, both from the language of the sections of the Revised Statutes referred to and the authorities cited, that it must, as stated by Mr. Justice Brewer, be conclusively presumed that Andrew P. Mayberry, as he failed to make any adverse claim, had none, and, as the plaintiff failed to show any right to the disputed premises, he became a stranger to the title, and thereafter had no more right than any other stranger to further contest the defendants' claim. While Mayberry has the right, like any stranger, to protest, he cannot do so on the basis of any rights he may have had in either the Levi P. or Veta mining claims. It follows that he conclusively waived his right to do so by failing to file an adverse claim, and that the plaintiff in this case, and all other strangers to the title, are likewise precluded from protesting on like grounds.

The trial court found that,

"On or about the 1st day of January, 1889, one Edmund H. Uhlig, then and there a citizen of the United States, entered upon the unoccupied and unappropriated mineral lands of the United States in West Mountain mining district, Salt Lake county, state of Utah, and having discovered thereon a lode of mineral-bearing rock in place, bearing lead, iron, silver, and other minerals, did then and there locate the same as the 'Uhlig, No. 1' and 'Uhlig, No. 2' lode mining claims, by marking the boundaries thereof upon the ground by suitable monuments, so that the boundaries thereof could be readily traced, and by posting at the points of discovery upon said mining claims, respectively, notices of location, describing the same by reference to natural objects and permanent monuments; that thereafter he caused copies of said notices of location, respectively, to be filed and recorded in the office of the district recorder of said West Mountain mining district. That thereafter the said Edmund H. Uhlig and the defendant the St. Joe Mining Company, remained in possession of said mining claims, working and developing the same, and causing to be done thereon and for the benefit of said claims, in each and every year up to and including the year 1900, the annual assessment work required by the laws of the United States."

The application for a patent for the Uhlig Nos. 1 and 2 was made on August 24, 1898. The Yes You Do was located on the 1st of January, 1898, eight years after the location of the Uhlig Nos. 1 and 2.

Section 2332, Rev. St. [U. S. Comp. St. 1901, p. 1433], provides that,

"Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state and territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property attached prior to the issuance of a patent."

Section 2997, subd. 2, Comp. Laws Utah 1888, provides that the words "real property as used in the Code of Civil Procedure, unless otherwise apparent from the context, are co-extensive with lands, tenements and hereditaments, water rights, and possessory rights and claims."

The territorial supreme court, in *Houtz* v. *Gisborn*, 1 Utah 173-176, held that, under said section, mining claims are real property and pass by deed. There are numerous authorities which hold (without regard to statutory provision) that mining claims are real estate. 1 Lindley on Mines, § 535; Barringer & Adams Law of Mining, p. 568 et seq.; *Aspen M. & S. Co.* v. *Rucker* (C. C.) 28 Fed. 222, and cases cited; *Harris* v. *Equator M. Co.* (C. C.) 8 Fed. 863; *Hughes* v. *Devlin*, 23 Cal. 506; *Roseville M. Co.* v. *Iowa M. Co.* 15 Colo. 29, 24 Pac. 920, 22 Am. St. R. 373; *McFeters* v. *Pierson*, 15 Colo. 201, 24 Pac. 1076, 22 Am. St. R. 388.

Section 2332 is applicable to lode mining claims. 2 Lindley on Mines, § 688; *Harris* v. *Equator M. Co.* (C. C.) 8 Fed. 863; *Altoona M. Co.* v. *Integral M. Co.* 114 Cal. 100,

45 Pac. 1047; *Belk* v. *Meagher,* 104 U. S. 279-287, 26 L. Ed. 735. In the last-mentioned case (page 287) after quoting section 2332, the court, speaking through Mr. Chief Justice Waite, said: "Under the provisions of the Revised Statutes relied on, Belk could not get a patent for the claim he attempted to locate, unless he secured what is here made the equivalent of a valid location, by actually holding and working for the requisite time. If he actually held possession and worked the claim long enough, and kept all others out, his right to a patent would be complete." In the case of *Altoona Quicksilver M. Co.* v. *Mining Co.* 114 Cal. 105, 45 Pac. 1048, Mr. Justice Temple, in connection with said section, said: "It must therefore follow that where such possession has continued for five years before the adverse right exists, it is equivalent to a location under the laws of Congress;" and in support thereof cites *Harris* v. *Equator M. Co. supra, Belk* v. *Meagher, supra,* and *Anthony* v. *Jillson,* 83 Cal. 296, 23 Pac. 419.

Subdivision 2, § 2997, Comp. Laws 1888, is still in Rev. St. 1898, subd. 10, § 2498.

A mining claim being a possessory right, it is real estate under the provisions of the statutes of Utah before referred to, and any claim which Mayberry might have had, as he failed to institute a suit to recover the same within seven years after the possession of the Uhlig Nos. 1 and 2, as found by the trial court, began, was barred by section 2859 of the Revised Statutes of Utah, which is as follows:

"No action for the recovery of real property, or for the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, grantor, or predecessor, was seised or possessed of the property in question within seven years before the commencement of the action."

It was also waived by his failure to adverse the application for a patent of the Uhlig Nos. 1 and 2. In view of these

facts, the plaintiff, even if J. Fewson Smith, Jr., had not been a deputy United States mineral surveyor, as the location of the Yes You Do was not made until eight years after the said possession of the Uhlig Nos. 1 and 2 was begun, could not avail himself of any rights which the said Mayberry may have had.

The objection to the admission in evidence of the certified copy of the notice of location of the Yes You Do, and the deed to Lavagnino, offered in connection therewith, and the objection to the evidence relating to the Levi P. and Veta mining claims, were properly sustained.

The decree of the court below is affirmed with costs.

BARTCH, J., and HART, District Judge, concur.

ECLIPSE OIL CO. v. HENRY GARNER ET AL.

(53 West Virginia 151; 44 S. E. 131. Supreme Court of Appeals. April 11, 1903.)

Ousted first lessee claiming compensation out of royalties. A lessor executes at different times two sets of oil leases to two different lessees, reserving the usual royalty, and, after the first leases have been avoided by the execution of the second, the first lessee pays two years' rental or commutation money to the lessor, with full knowledge of the execution of the second leases. Such payment does not entitle such lessee to claim the reserved royalty, or any part thereof, either in law or equity.
(Syllabus by the Court.)

Appeal from Circuit Court, Wetzel County; M. H. WILLIS, Judge.

Bill by the Eclipse Oil Company against Henry Garner and others. Decree for defendants, and plaintiff appeals. Affirmed.

FLEMING & FLEMING and U. N. ARNETT, JR., for appellant.

CALDWELL & CALDWELL and HALL & HALL, for appellees.

DENT, J. The Eclipse Oil Company appeals from a decree of the circuit court of Wetzel county dismissing its bill filed in a certain chancery suit therein pending instituted by it against Henry Garner and others to have an accounting of certain oil royalty. This suit is the sequel to the chancery cause of the same plaintiff against the *South Penn Oil Com-*

A lease being forfeited, a sub-lessee took a new lease from the owner; held that he was not a trustee for benefit of the original lessee, his original direct lessor. *Cook* v. *Basom* (Mo.) 65 S. W. 227.

pany and others, 47 W. Va. 84, 34 S. E. 923, where the facts may be found stated at length. In that case the plaintiff's leases were held void as to the subsequent leases of the defendant. Plaintiff now insists that it is entitled to the one-eighth royalty received by Henry Garner under and by virtue of his lease to the South Penn Oil Company.

The grounds of this claim, as stated in the bill, are: First, that the plaintiff, after Henry Garner had executed his second leases owned by the South Penn Oil Company, paid him $2,175 on the 10th of November, 1898, and $2,175 October 31, 1899, being the rentals or commutation money for the years expiring on the 10th day of November, 1898, and the 10th day of November, 1899, which the said Garner received in full satisfaction of such rentals; second, that the said Garner by reason of the execution of the South Penn Oil company leases and putting the latter company in possession, had wrongfully deprived the plaintiff of the benefit of its leases; and, third, that the plaintiff's leases covered this royalty.

Examination of the leases shows that the last contention is untenable, for the reason that, in effect, Henry Garner was to have this one-eighth royalty under the provisions thereof. The second ground is *res adjudicata* by reason of the former decision of the court in that it was held that the plaintiff's leases were void at the time Henry Garner executed the South Penn Oil Company leases, and that he had the legal right to make the latter, and avoid the former.

The only question, then, is as to what rights the plaintiff acquired by reason of the payment of the commutation money after its leases had been legally avoided. It did not acquire thereby any right to the one-eighth royalty, for the reason that its leases contain the provision: "The parties of the second part, heirs or assigns, agree to give to the first party ⅛ part of all the petroleum obtained from the said premises as produced in a crude state; the said ⅛ part of the pe-

troleum to be set apart in the pipe line running said petroleum to the credit and for the benefit of the said party of the first part." This amounts to a clear reservation of the royalty which the defendant Garner is charged with receiving, and deprives the plaintiff of any right to have or demand the same.

The bill shows that the first payment of rental was made on the 10th day of November, 1898, being some days prior to the time when the South Penn Oil Company took possession under its leases, and this sum so paid was for the 12 months already expired. The bill does not allege that the plaintiff during this time was in any manner prevented from taking possession of and boring wells on the land under its leases. Hence the payment of this money was for a past term, which it had fully enjoyed, in so far as Henry Garner was concerned, and in satisfaction thereof, and can in no manner give it any right to set up a claim to his royalty. The second payment was made after the South Penn Oil Company had taken possession of and developed the land, and was not for the purpose of purchasing the royalty, but for the purpose of enabling it to maintain its suit then pending against the South Penn Oil Company. Both payments were made with open eyes and full knowledge of all the facts, and on the sole theory that plaintiff's legal right to develop the land for oil and gas was superior to that of the South Penn Oil Company, and this it enjoyed to the fullest extent. In short, it bought a lawsuit, and got it. The claim to this royalty is, therefore, an afterthought arising from legal defeat, and has no foundation from the showing of plaintiff's bill, either in equity or at law. Nor has the plaintiff any lien upon or charge against this royalty for the payment of the rent, or any part thereof. These propositions are so plain that it is labor wasted to argue them. Whether the plaintiff is entitled to recover the rent, having paid it with full knowledge, is for a court of law to determine. Its right to such

legal adjudication is reserved by the decree of the court. The bill being entirely based on the contention that the plaintiff is entitled to the royalty, or some part thereof, and such claim being without foundation, the circuit court committed no error in sustaining the demurrer and dismissing the same. Nor did the court err in retaining the cause until the receiver's accounts were settled. The plaintiff should pay all costs of the suit.

The decree is affirmed.

CLINTON B. WISER ET AL. v. JOHN LAWLER ET AL.

(189 U. S. 260. 23 Sup. Ct. Rep. 624. Supreme Court. April 27, 1903.)

Suppression of facts. Promoters of mining enterprises, in the preparation of prospectuses, are bound to consider the effect that would be produced upon an ordinary mind by the statements contained in them, and in estimating the probability of persons being misled by them, the court may take into consideration not only the facts stated, but the facts suppressed.

Vendors of mining properties are not responsible for false statements, made in prospectuses issued by a mining company to whom the properties had been sold, unless they knew or connived in such statements, or were active in putting them in circulation. While they may have known that prospectuses were being issued, they were under no obligation to read them, or contradict their statements or promises, or interfere with their circulation or distribution.

If their title be of record they are not bound to give notice of their rights in the property to the purchasers of stock, or to refuse the money due upon their contract of sale when it is tendered them.

To constitute an estoppel by silence there must not only be an opportunity but an obligation to speak, and the purchase must have been in reliance upon the conduct of the party sought to be estopped.

Record title. Notice to improvers. A person holding a deed of property which he has placed upon record, is not ordinarily bound to disclose his title to persons contemplating purchasing, or making improvements upon the land, unless his silence be deceptive, or accompanied by an intention to defraud.

Appeal from the Supreme Court of the Territory of Arizona to review a decree which affirmed a decree of the District Court of Yavapai County dismissing a bill which

Statements in prospectus may be so reckless as to amount to fraud. *Glamorganshire Co.* v. *Irvine*, 6 M. R. 565.

Directors held personally for false prospectus. *Morgan* v. *Skiddy*, 7 M. R. 74.

False prospectus aided by false oral statements held sufficient to make case for rescission. *Ormsby* v. *Budd*, 72 Ia. 80; 33 N. W. 457.

A disastrous outcome does not presuppose fraud or misconduct. *DuPuy* v. *Transportation Co.* 82 Md. 408; 34 Atl. 910.

seeks to charge the owners of mining properties with the fraud perpetrated on subscribers to the stock of a corporation in possession of such property by misstatements as to title contained in its prospectuses. Affirmed.

This was a complaint in the nature of a bill in equity filed in the district court of Yavapai county, Arizona, by appellants, for themselves and all others interested, against John Lawler and Edward W. Wells, principal defendants, and the Seven Stars Gold Mining Company, the Industrial Mining & Guaranty Company, and John Griffin, receiver of such companies, to adjudge Lawler and Wells to be estopped from disputing the title of the Seven Stars Company to certain mining properties, and to decree such properties to belong to that company, and for an account of the proceeds of all ore taken from the mines and received by defendants Lawler and Wells, or, in the alternative, for a money decree against them for the aggregate amount paid by plaintiffs and others for stock in the company, upon the representations contained in certain prospectuses and maps, by which the plaintiffs were induced to purchase stock in such company, and for a confirmation of the title to the property in such defendants.

The cause came on for hearing upon the pleadings, and at first resulted in an interlocutory decree in favor of the plaintiffs, with an order for an accounting by defendants. The case was then referred to a master to report the number of shares in the Seven Stars Company subscribed and paid for, and to ascertain the amount paid to defendants Lawler and Wells on account of the purchase price of the property. This was finally fixed at the sum of $180,139.82, which was held to be a lien, and the property was ordered sold in satisfaction thereof. A new trial was subsequently granted, upon the hearing of which, upon pleadings and evidence, it was held that plaintiffs were entitled to no relief, and the complaint

was dismissed, and an appeal taken to the supreme court of Arizona, which affirmed the decree of dismissal. 62 Pac. 695.

The supreme court made a finding of facts in sixty-four paragraphs, which is quite too long to be reproduced here, but which may be summarized as follows:

In May, 1892, the defendants Lawler and Wells were the owners of the legal title to a collection of mines known as the "Hillside Group," the muniments of such title being of record in the county recorder's office of Yavapai county.

Lawler and Wells offered these mines for sale at $450,000 cash, and on May 12 one Warner visited the mines and contracted for their purchase for $450,000, paying $20,000 in cash, the remainder to be paid in instalments in accordance with the terms of an escrow agreement entered into between Lawler and Wells and one Cowland. This agreement provided, among other things, that a deed conveying the mines to Cowland be held in escrow by the Bank of Arizona and be delivered upon paying the full sum of $450,000; and that, upon the failure of the payments, the deeds should be redelivered to Lawler and Wells, and all payments be forfeited. Cowland agreed that all moneys paid by him should belong to Lawler and Wells, and should be retained by them as liquidated damages accruing from the failure to pay for the property, and Lawler and Wells be released from any obligation to convey the property. It was further agreed that Cowland might take possession of the property, develop and operate it, the proceeds to be paid to the vendors and credited upon the purchase price; that Lawler and Wells should, nevertheless, remain in legal possession of the property until full payment, but should not work it or interfere with its operation by Cowland. It was further agreed that, should Cowland fail to make any payments, all improvements on the property and ore taken therefrom should be the property of Lawler and Wells. A deed of the property was executed

to Cowland and placed in escrow as above stated. Warner was the real party in interest and Cowland only his agent.

On June 14 Warner and Cowland, with some others, incorporated the Industrial Mining & Guaranty Company for the purpose of handling mines and buying and selling stock, to which company Cowland delivered a written assignment of all his interest in the escrow agreement, as well as a deed of the mining properties, with a covenant of warranty against encumbrances. The new company assumed all the covenants of Cowland in the escrow agreement, to make the payments therein stipulated, and to procure the escrow deed, then in the hands of the Bank of Arizona. Possession of the properties was delivered to the new company with full knowledge on its part of the terms of the escrow agreement. The company remained in possession until October 1, 1892.

On August 15, 1892, Warner and several others incorporated the Seven Stars Gold Mining Company under the laws of New Jersey, of which certain persons, including one of the plantiffs, were elected directors. About the same time the guaranty company offered to sell and convey all its interests in certain mining properties, including a part of those described in the escrow agreement, to the Seven Stars Company, upon receiving $2,800,000 in cash or stock of such company. On October 1, the guaranty company placed the Seven Stars Company in possession of the Hillside Group, with full knowledge on the part of the latter of the terms of the escrow agreement.

The guaranty company, as the agent of the Seven Stars Company, issued in September, 1892, a prospectus, known as the American prospectus, to promote the sale of the stock of the Seven Stars Company, 300,000 of which prospectuses, accompanied by a map and an application for subscription to stock, were circulated throughout the United States. In October, 1892, the guaranty company directed the issuing of an English prospectus, which was never circulated, but

another, issued without the authority of the guaranty company or the Seven Stars Company, was prepared, supervised, and circulated by Cowland. The descriptive matter in this prospectus was obtained from data furnished by the officers of the guaranty company. The circulation of this prospectus amounted to 80,000 copies, and accompanying each copy was a map and application for subscription to stock; but neither Lawler nor Wells had any knowledge or information that this prospectus had been or was being circulated in England, or had any knowledge of its contents until some time in October, 1893. The further material facts are set forth in the opinion.

Messrs. MICHAEL F. GALLAGHER and G. W. KRETZINGER, for appellants.

Messrs. WILLIAM C. SCARRITT, H. C. MCDOUGAL, and E. L. SCARRITT, for appellees.

Mr. JUSTICE BROWN, after making the foregoing statement, delivered the opinion of the court:

The principal defendants to this suit are Lawler and Wells (hereinafter termed "the defendants"), and the case turns upon their complicity in, and responsibility for, the contents of the prospectuses, which are full of exaggerated and delusive statements, and were undoubtedly a gross fraud upon persons who took stock upon the faith of their exuberant promises. Indeed, they were of such a character as to create surprise that intelligent investors should have believed their statements to be true. The representation upon which the greatest reliance is placed is that contained in the American prospectus; that "the titles are unquestionable to the Seven Stars, Hillside, Happy Jack, and other mines, being held under United States patents;" and in the English

prospectus, that "the mines *owned by the company* are situated in the Eureka mining district, Yavapai county, Arizona," and that "the title is indefeasible, being United States patents to five claims, together with several locations as easements."

Attached to these prospectuses was a map entitled "map of the group of mines belonging to the Seven Stars Gold Mining Company." It is true that there is neither in the prospectuses nor in the map a distinct assertion that the legal title to the properties mentioned was vested in the Seven Stars Company; but we think that no one can read them without inferring and believing that the Seven Stars was the owner of these properties, and that the net proceeds of their operation would be distributed in dividends to stockholders. As they were circulated as an inducement to take stock in the enterprises, we are bound to interpret them by the effect they would produce upon an ordinary mind. *Andrews* v. *Mockford* [1896] 1 Q. B. D. 372. They were, however, even more damaging in their omissions than in their statements. No mention was made of the fact that the title to these properties stood in the names of Lawler and Wells; no allusion to the Cowland agreement, with its provisions for forfeiture, nor to the fact that the only interest of the company was an equitable right to the properties after the sum of $450,000 had been realized from the profits and paid to defendants. In estimating the probability of subscribers being misled by these prospectuses we may take into consideration, not only the facts stated, but the facts suppressed. *New Brunswick & C. R. & Land Co.* v. *Muggeridge,* 1 Drew. & S. 363. They are entitled to know the cons as well as the pros. *Gluckstein* v. *Barnes* [1900] A. C. 240; *Hubbard* v. *Weare,* 79 Iowa 678, 44 N. W. 915; *Hayward* v. *Leeson,* 176 Mass. 310, 49 L. R. A. 725, 57 N. E. 656; *Re Leeds & H. Theatres* [1902] 2 Ch. Div. 809.

It does not appear, however, that these defendants were

promoters or interested in the organization of the guaranty company or the Seven Stars Company, or in the sale of the capital stock of such companies, although they knew that Warner's intention was to incorporate a company, and, to use the language of one of the defendants, "work it for all there was in it." As they were not concerned in the methods used to procure subscriptions to stock, or in the statements made in the prospectuses, it is difficult to see how they can be held responsible, unless they are made so by the fact that they knew and connived in the misstatements as to the title of the company. But while they might have known that the prospectuses were being issued, they were under no obligation to read them or contradict their exaggerated statements and promises. In their agreement with Cowland they had stipulated that he, or his assignee, should explore, work, and operate the property, and they could not have failed to know that this would be done through a company organized for that purpose. Such company would be authorized to issue prospectuses and obtain subscriptions to stock as best it could, and, clearly, defendants were not bound to supervise its methods in doing so, or render themselves responsible for statements made by the company, provided they did not indorse them. There were no relations between them and the purchasers of the capital stock, and no duty on their part to interfere with the circulation and distribution of the prospectuses and maps, or to inform the subscribers personally that they were the owners of the legal title to the property. They had the right to rely, so far as respected these companies and their stockholders, upon the fact that their title was of record, and was notice of their rights to every one who contemplated taking stock in the company.

The testimony bearing upon the complicity of Lawler and Wells with the preparation of these prospectuses and maps is such as amounts rather to a suspicion that they may have known and approved of their contents, than to positive proof

that they received their indorsement. Of course, if it were shown that they were put forth by them personally, with knowledge upon their part of their contents, and of the falsity of their statements, and that they were issued as a basis of obtaining subscriptions to stock, they would be justly held liable as participants in the fraud; but the mere fact that they turned over the organization of the company to other parties, who would pursue the usual course of issuing prospectuses for the purpose of raising subscriptions, would not, of itself, charge them with the duty of examining and verifying their statements.

The facts principally relied upon are that the defendants caused to be delivered to Mr. Rickard, an agent of Cowland, a report previously made upon the mines, known as the Blauvelt report, together with a map of the underground workings of the mines, known as the Blauvelt map, as well as copies of the smelter and milling returns of ores shipped from the mines, known as the "smelters' returns." It is not found, however, that these documents were false in any particular, except the map, which was prepared by one Brodie, without the knowledge of the defendants, but was seen by defendant Lawler hanging in the office of the companies in New York, and was entitled "Plat of the Hillside and adjoining claims," although it appears that afterwards, without the knowledge of Lawler, these entitling words were changed, before the maps were distributed, to the words, "Map of group of mines belonging to the Seven Stars Gold Mining Company." It thus appears that when Lawler saw this map it contained no words indicative of ownership in the Seven Stars Company. It also appeared that in August of the same year defendant Wells visited the office of the Guaranty Company in New York, and while there had an interview with Warner, president of both companies; but the evidence does not show that anything was said to Wells about the plans of the companies, or the issue and circulation of a prospectus;

although Lawler became aware of the fact that the prospectus was being prepared for circulation, and for the purpose of promoting the sale of the stock of the company, and that the Blauvelt report and map were being used in connection with it.

In October, 1892, Warner represented to the defendants that he was unable to place the securities he held, in time to meet the payment of that portion of the price falling due November 12, and, relying upon his representations and requests, defendants agreed to an extension of the time; but on May 8, 1893, the whole scheme, so far as Warner was connected with it, collapsed by his executing a general assignment of his property for the benefit of his creditors. Defendants, learning of this, made a further agreement with Cowland, extending the time for payment under his agreement, receiving, as part of the consideration, $50,000 par value of the guaranteed capital stock of the Seven Stars Company, and the appointment of Lawler as manager of the mines. In May, 1893, Lawler received notice in writing that remittances on account of the Cowland contract were being made from money derived from the sale of stock of the Seven Stars Company, and in August, 1893, the chancery court of New Jersey, in which state the company was incorporated, appointed defendant Griffin receiver of both companies. In September, defendants, as owners of the legal title, and exercising their rights under the original escrow agreement, entered into possession of the group of mines, and remained in exclusive possession until September, 1897, when a receiver was appointed by an Arizona court.

The most important item of testimony, and one which lies at the basis of this suit, is the fact that the defendants received from the proceeds of the mines, during their operation by the Seven Stars Company, sums aggregating $47,812.25, and also received from Warner and others, on account of the purchase price of the property, $112,339.96.

This, however, they had a perfect right to do under their contract, unless they were distinctly apprised of the fact that it was fraudulently procured. But the prospectus, map, and application were prepared under the supervision of Warner, and the documents framed in accordance with his views. The evidence tends to show that while defendants had knowledge of the preparation and circulation of the prospectus and maps, knowledge of the statements and representations contained in them is not brought home to them, nor were they bound to inform themselves as to their contents.

There are further findings that defendants in October, 1892, became aware that the American prospectus was being distributed by the guaranty company, and that they did not at any time protest against its preparation or circulation, or in any way give notice of their rights in the mines to any of the purchasers of the stock of the Seven Stars Company, except as such notice might be imputed to them through the record title in defendants. But it is further found that they did not, at the time the subscriptions to the stock were being made, make any representations or communications to any subscriber to said stock; nor did they have any notice or knowledge that any moneys received by them on account of the purchase price formed a part of the money raised from subscriptions to stock and paid by the Guaranty Company on account of the purchase price—at least, not until May 20, 1893, when nearly all the payments had been made. Neither were they interested, as promoters or otherwise, in the organization of either of the corporations, or in the issue or circulation of the prospectuses, or the sale of the capital stock.

Were they bound to refuse the money when it was tendered them? Even if defendants had knowledge or notice that payments received by them on account of the purchase price were made from moneys raised from subscriptions to stock, there was no impropriety in receiving their money from the pro-

ceeds of the sales of the stock, although the contract specified only that they should be entitled to the proceeds of the ore mined. As they had agreed to sell their interests at $450,000, and Cowland had agreed to pay that amount, it may be assumed that this was the real value of the properties at that time. This amount defendants had a right to receive before they surrendered the deed of the properties, but how it was to be raised was no concern of theirs. Granting the provision in the contract for the forfeiture of all moneys paid, in case the sale finally fell through, to have been a harsh one (and in fact it was much less harsh than it appeared to be), it was fully understood and agreed upon by both parties; and while a bill in equity might not have lain to enforce it, it does not follow that defendants will be compelled to return the money unless they actively participated in the representations under which it was raised. The case would have been stronger if the Cowland agreement had provided distinctly that a mining company should be formed and defendants paid from the proceeds of sales of its stock, but the agreement made no provision how the money should be raised or from what fund it should be paid, except that the proceeds of the operation of the mines and the ores should be at once paid to the defendants and be credited on the agreement. It was not provided, however, that this should be the only source from which the money should be raised.

As a matter of fact, the guaranty company was engaged in promoting sundry mining and industrial enterprises, including the business of the Seven Stars Company; and during the time the payments were being made, it received and disbursed the sum of $824,142.13, which was deposited in its own name in a common fund in the Continental National Bank, and checked out by the guaranty company in its various business enterprises as required, and, amongst others, to the defendants on account of the Cowland agreement. These checks, which were generally payable to Cowland, were

collected by the payee, the money transmitted to the Bank of Arizona, and placed to the credit of defendants on account of the purchase price of the property. Between June 15, 1892, and September 18, 1893, the guaranty company paid out for operating expenses, purchase of machinery, purchase price of the Hillside group of mines, dividends, and all other expenses, an aggregate sum of $380,295.81—over $100,000 more than the amount of money received from the sale of the Seven Stars guaranteed stock.

The case, then, comes to this: Whether the mere facts that defendants knew that a prospectus was to be issued, that they furnished the Blauvelt report (not shown to be false) to which was appended a map indicating (though not to their knowledge) that the mines belonged to the Seven Stars Company, and that they might have informed themselves, if they had chosen to do so, of the contents of the prospectus, and did actually receive a large amount of money without knowing the source from which it came—render them liable as participants in the fraud perpetrated by the circulation of the prospectus.

Putting the case in the most favorable light for the plaintiffs, it was only a case of estoppel by silence. Indeed, it was not even an ordinary case of estoppel by silence, but an estoppel by silence concerning facts of which defendants may have had no actual knowledge. To constitute an estoppel by silence there must be something more than an opportunity to speak. There must be an obligation. This principle applies with peculiar force where the persons to whom notice should be given are unknown. So, too, to constitute an estoppel, either by express representation or by silence, there must not only be a duty to speak, but the purchase must have been made in reliance upon the conduct of the party sought to be estopped; and the express finding of the court in this case is "that the subscribers to the capital stock of the Seven Stars Company, in making their several sub-

scriptions therefor and payments thereon, did so without any knowledge of, and without relying on, anything said or done, or omitted to be said or done, in the premises by the said Lawler and Wells, or either of them." Granting that if these subscribers had known all the defendants knew regarding the title to this property, they would not have subscribed to the stock of the company, it does not follow that defendants were bound to take active steps to inform the public of that which already appeared upon the record.

This case does not belong to that class of which *Gregg* v. *Von Phul,* 1 Wall. 274, is an example, wherein it was said that "if one has a claim against an estate, and does not disclose it, but stands by and suffers the estate [to be] sold and improved, with knowledge that the title has been mistaken, he will not be allowed afterwards to assert his claim against the purchaser." Such cases are believed to be confined to those where the party's silence is inconsistent with the position subsequently assumed by him, as where he suffers land to be improved while holding an unrecorded deed of it. In this case, however, defendants' position was perfectly consistent with their title of record and with the Cowland agreement, which distinctly provided that Cowland or his assignees should enter into possession, develop and work the mines upon their own account, though paying the proceeds to them.

But, conceding defendants to have been apprised of the contents of the prospectus, it would certainly be an exceptional case if a person holding a deed of property which he has placed upon record would be bound to disclose his title to a person contemplating purchasing or making improvements upon the land, or would be estopped from making his claim thereto by mere silence, since he has a right to rely upon the constructive notice given by the record; although the rule would be otherwise in case of positive misrepresentations upon his part. *Brant* v. *Virginia Coal & I.*

Co. 93 U. S. 326, 337, 23 L. Ed. 927, 929; *Knouff* v. *Thompson,* 16 Pa. 357; *Brinckerhoff* v. *Lansing,* 4 Johns. Ch. 65, 8 Am. Dec. 538; *Rice* v. *Dewey,* 54 Barb. 455; *Kingman* v. *Graham,* 51 Wis. 232, 8 N. W. 181; *Sulphine* v. *Dunbar,* 55 Miss. 255; *Porter* v. *Wheeler,* 105 Ala. 451, 17 So. 221. The authorities also recognize a distinction between mere silence and a deceptive silence accompanied by an intention to defraud, which amounts to a positive beguilement. *Sumner* v. *Seaton,* 47 N. J. Eq. 103, 19 Atl. 884; *Hill* v. *Epley,* 31 Pa. 331; *Markham* v. *O'Connor,* 52 Ga. 183, 21 Am. Rep. 249.

For instance, if a mortgagee stood by while a mortgagor was selling a piece of property to a person whom the mortgagee knew was purchasing the property upon the supposition that it was unencumbered, he might be estopped by his silence, even though his mortgage were of record. But, upon the other hand, if he were merely informed that the mortgagor was endeavoring to sell the property as unencumbered, he would clearly be under no obligation to look up the purchaser, or to inform the public generally of the existence of the mortgage. In such case he might safely rely upon the record. No duty to speak arises from the mere fact that a man is aware that another may take an action prejudicial to himself if the real facts are not disclosed. *Sullivan* v. *Davis,* 29 Kas. 28. As stated by Bigelow on Estoppel, 5th ed. page 596: "So long as he is not brought in contact with the person about to act, and does not know who that person may be, he is under no obligation to seek him out, or to stop a transaction which is not due to his own conduct as the natural and obvious result of it." It cannot be that A would be estopped by silence with respect to his title to property which B is about to purchase, when he has no knowledge that B contemplates buying and B has no knowledge that A is connected with the property. We know of no case holding that a man is estopped by silence as against the pub-

lic, or any particular person with whom he has no fiduciary relation. It was said by the court of appeals of New York in *Viele* v. *Judson,* 82 N. Y. 32, 40, of the cases holding a party to be estopped by his silence: "In all of them the silence operated as a fraud and actually itself misled. In all there was both the specific opportunity and apparent duty to speak. And, in all, the party maintaining silence knew that some one else was relying upon that silence, and either acting or about to act as he would not have done, had the truth been told. These elements are essential to create a duty to speak."

Before holding that defendants are liable by reason of their silence it ought to be made to appear what action they could have taken to prevent the perpetration of the fraud embodied in the prospectus and maps. If they had actually participated in it by circulating these documents, or representing them to be true, the case would have been different; but if they be held at all it must be by reason of their silence and inaction, when it is not even shown that they were cognizant of the statements contained in them. They may have seen them, but they were not bound to read them, or inform themselves of the truth of their statements, since they were no party to them in any way whatever, and were interested only in obtaining payment for their property. But, conceding that they were fully apprised of their contents, what action were they bound to have taken? They could not give notice to the hundreds of thousands to whom the prospectuses were sent, since they were not even apprised of their names or addresses. A notice to the company not to send out these prospectuses would have been equally futile, in case the directors chose to disregard it, since they could not control their action, nor could they have sustained a bill for injunction, since they could have shown no personal injury to themselves by reason of the action of the promoters.

The difficulty of doing exact justice to the plaintiffs in this

case, without also doing an injustice to the defendants, suggests another reason why they should not be charged with liability for the circulation of this prospectus and map, without clear proof of their complicity. At the time of the sale of these mining properties their real value must have been unknown. If the mines proved successful they may have been worth millions; if unsuccessful, they would be of little value—perhaps worthless. The amount agreed upon, $450,000, was one which the defendants were willing to take as a compromise, and one which the plaintiffs were willing to pay as a speculation. Each party to the sale took his own chances, and no complaint is made of unfair dealing on either side. In their cross complaint defendants tendered to the court, and offered to deliver, the deed and possession of the mines, upon the payment of the residue due them under the escrow agreement. If the property be now more valuable than the amount agreed to be paid, no reason is apparent why the tender should not have been accepted. If, as appears to be more probable, it is of less value, or wholly valueless, the defendants in refunding the amount paid would not only lose that amount, but all possibility of reselling the mines to other parties, and would thereby assume the risk of an unfortunate speculation, which the whole design of the sale was to impose upon the purchasers under the Cowland agreement, namely, the plaintiffs. In making the purchase the vendees were willing to assume the risk of the mines proving unsuccessful. The vendors were evidently unwilling to take this risk, and preferred to take a sum certain for their speculative chances. Assuming that, in equity, the defendants could be called upon to refund the money paid, it seems unjust that they should also be saddled with the burden of an unfortunate speculation. In short, the circumstances have so changed that justice cannot be done without imposing damages upon the defendants which were not within the contemplation of the parties.

If the first alternative prayer of the bill were granted, and it were adjudged that the defendants were estopped from asserting that the Seven Stars Company was not the owner of the mining properties, and adjudging such company to have full title thereto, and that defendants should also repay all the proceeds of ore taken therefrom and received by them, amounting to $47,812.25, it will result that of the $450,000, agreed upon as the price of the property, they would have received but $112,339.96, and would lose $337,660.04 of the amount agreed to be paid. Upon the other hand, if the second alternative prayer were granted, and defendants were adjudged to return the money found due in the first decree of the district court, namely, $180,139.82, and retake the property, which now appears to be of little value, they would be practically, in either case, charged with the entire burden of the venture which it was the express object of the Cowland agreement to avoid. A decree that would bring about this result would savor of punishment to defendants rather than of compensation to plaintiffs.

We think the plaintiffs have wholly failed to make out such a complicity on the part of the defendants with the preparation and circulation of these prospectuses as would make them liable for the losses which the plaintiffs have doubtless sustained.

The decree of the court below is therefore affirmed.

NORTHWESTERN OHIO NATURAL GAS CO. v. JOHN J. ULLERY.

[1](68 Ohio State 259; 67 N. E. 492. Supreme Court. April 28, 1903.)

Oil and gas rights follow the property. Where an oil and gas lease is made by one party to another covering two or more separate tracts of land, and is made to extend to the heirs and assigns of the parties, and different persons become the owners of such different tracts, each owner is entitled to the oil and gas produced on his tract, and to the royalty and rental arising from such tract. (Syllabus by the Court.)

Error to Circuit Court, Wood County.

Action by John J. Ullery against the Northwestern Ohio Natural Gas Company. Judgment for plaintiff was affirmed by the circuit court, and the defendant brings error. Affirmed.

John A. Taylor was the owner of two tracts of land cornering each other, one containing 40 acres and the other 60. He executed and delivered the following written instrument:

"This agreement made and entered into this tenth day of June, A. D. 1886, by and between John A. Taylor, of Cass township, of the county of Hancock, and state of Ohio, of the first part, and William Duke, Jr., of Wellsville, N. Y., of the second part.

"Witnesseth: That the said party of the first part, for the consideration of the covenants and agreements hereinafter mentioned, has granted, demised and let unto the party of the second part, his

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[1]Cited in note to *Wettengel* v. *Gormley*, 19 M. R. 213.

Two adjoining owners made a single lease of their two farms to an oil company—all its wells were bored on the land of one of the lessors. *Held*, that parol evidence was admissible of parol agreement between them that each was to receive the royalty of what was produced from his separate land. *Rymer* v. *S. Penn. Co.* 54 W. Va. 530; 46 S. E. 559. *Wettengel* v. *Gormley*, 19 M. R. 213, disapproved.

heirs or assigns, for the purpose and the exclusive right of drilling and operating for petroleum and gas, all that certain tract of land situated in Cass township, Hancock county, and state of Ohio, bounded and described as follows, to wit: The south half of the west half of the southwest quarter section No. 2, and three-fourths (¾) of the north half of the northeast quarter, section No. three (3) Cass township, Hancock county, Ohio, containing one hundred acres, be the same more or less, together with the right of using sufficient water therefrom necessary to the operation thereof, excepting from wells now located except by consent of first party, the right of way over on said premises, the right to lay pipes to convey oil or gas, and the right to remove any machinery or fixtures placed on said premises by the party of the second part.

"The party of the second part, his heirs or assigns, to have and to hold the said premises for and during the term of five years from the date hereof and as much longer as oil or gas is produced or found in paying quantities thereon.

"In consideration of said grant and demise, the said party of the second part agree to give or pay to the said party of the first part, the full equal one-eighth part of all the petroleum produced or found on the said premises, and to deliver the same, free of expense, into tanks or pipe lines to the credit of the first party. And should gas be found in sufficient quantities to justify the party of the second part in marketing the same, the consideration in full to the party of the first part, instead of the petroleum royalty, shall be $100 per annum for the gas from each well so long as it shall be sold therefrom.

"It is further agreed that the party of the second part shall complete a well on the above-described premises within nine months from the date hereof, and in case of failure to complete such well within such time, the said party of the second part agree to pay to the said party of the first part, for such delay, a yearly rental of fifty cents per acre on the premises herein leased from the time of completing such well as above specified until such well shall be completed; the said yearly rental amounting to fifty dollars, shall be deposited to the credit of the party of the first part in the First National Bank, Findlay, Ohio, or be paid direct to the said party; and a failure to complete such well, or to make such deposit or payment as above mentioned, shall render this lease null and void and to remain without effect between the parties hereto.

"Above named payment to be made by the first day of March in each year.

"Party of the second part to furnish all the gas necessary for domestic use, including not to exceed five hundred feet of one-inch pipe to convey the gas from the well to the dwelling, free of charge.

"It is understood between the parties of this agreement that all conditions between the parties hereunto shall extend to their heirs, executors and assigns.

"In witness whereof, we, the said parties of the first and second parts, hereunto set our hands and seals, the day and year first above written.

"JOHN A. TAYLOR. [SEAL.]
"SOPHIA A. TAYLOR. [SEAL.]
"WM. DUKE, JR. [SEAL.]"

This instrument was duly witnessed, acknowledged, and recorded, and was afterward duly assigned to the plaintiff in error. Afterward extensions were made by writing the following Exhibits B and C on the back of said instrument:

"EXHIBIT B.

"May 15, 1891.

"In consideration of the sum of $150 to me paid by The N. W. O. N. Gas Co. and further agreement to pay me the same sum on or before June 10, 1892, I consent to the extension of all the terms and conditions of the within lease for two years from June 10, 1891, or until June 10, 1893.

"JOHN A. TAYLOR.

"Witness: L. C. BEATTY."

"EXHIBIT C.

"In consideration of the sum of $150 to me in hand paid by The N. W. O. N. Gas Co. and the further agreement to pay one hundred and fifty each year in advance, I do hereby agree to extend the terms and conditions of this within lease from June 10, 1893, to June 10, 1894, and from year to year so long as the $150 shall be paid, and when well is drilled to draw $150.

"JOHN A. TAYLOR.

"Witness: J. C. NOBLE.
"April 5, 1893.
"No. 194. 100 acres."

Said exhibits were not filed for record, and were not recorded.

On the 31st day of March, 1894, said John A. Taylor

conveyed by warranty deed to said John J. Ullery the said 40-acre tract, making the following exception to his warranty: "Except against gas lease and pipe line privileges granted to the Northwestern Ohio Natural Gas Co." On the same day said John A. Taylor conveyed by warranty deed to one Alvin L. Shoop the said 60-acre tract, making the following exception to his warranty: "Except against gas lease held by the Northwestern Ohio Natural Gas Co., including all pipe line right of way." On May 24, 1894, the gas company paid to Ullery and Shoop the sum of $150 rental from June 10, 1894, to June 10, 1895, and took a receipt signed by both, and each year thereafter tendered the rental to both, which was refused, as Mr. Shoop had disposed of his interest in the gas. Tender of four-tenths of the rental was also made to Mr. Ullery and refused by him. The gas company admits that it owes Mr. Ullery $240 of rental. On or about June 10, 1895, the gas company drilled a well on said 40-acre tract, which has ever since produced gas in sufficient quantities to require the payment of a rental of $150 per year for that well, as provided at the end of the extension of date of April 5, 1893. In the month of April, 1895, Mr. Shoop made and delivered a gas lease of his 60-acre tract to the city of Tiffin, and in a contest between that city and the plaintiff in error here the city of Tiffin held the gas right. The case came to this court, and is found in *Northwestern O. N. G. Co.* v. *Tiffin,* 59 Ohio St. 420, 54 N. E. 77, where the facts are fully stated, and it there appears that the gas company lost by reason of its failure to have said extension recorded. In the year 1899 Mr. Ullery began his action against the gas company for the recovery of the $150 rental from the 10th day of June, 1895, to the 10th day of June, 1898, with interest. After the answer had been filed, the plaintiff below took an assignment from Mr. Shoop of his interest in the rental, and averred that fact in an amendment to his petition. An answer was filed, in which many things contained in the

petition are admitted and averments made as to other matters, but the foregoing facts are taken from the record, and seem to be controlling.

DOYLE & LEWIS and TROUP & TRUESDALE, for plaintiff in error.

E. D. BLOOM and D. R. JONES, for defendant in error.

BURKET, C. J. (after stating the facts). It will be noticed that the extension of April 5, 1893, requires the rental of $150 to be paid each year in advance, and this must prevail over the averment in the answer that it is not required to be paid in advance. Whether the rental was tendered in advance each year and refused is not clear from the record, but it will be here regarded as having been so tendered and refused. The plaintiff in error claims that it was entitled to judgment in its favor, except as to the $240, upon the conceded facts found in the pleadings, and which are stated above so far as controlling or material; its claim being that the gas lease entered into by Mr. Taylor was an entirety and indivisible, that the rental of $150 was for the whole 100 acres; that it was evicted from the 60 acres by the lease of Mr. Shoop to the city of Tiffin; and that in no event can Mr. Ullery, the owner of the 40 acres upon which the gas well is situated, recover more than his proportionate share of the yearly rental, $60, out of the $150.

While the lease does not expressly state that the lands may be subdivided, such subdivision seems to be implied, because it is made to extend to heirs, executors, and assigns. There might be many heirs and many assigns. In this case there are two assigns, and it would seem that each would be entitled to his separate and individual interest in the oil or gas produced on his part of the land. But whether each is so entitled does not depend so much upon the word "assigns,"

as upon the principle of entirety and divisibility in such cases.

We fully concur in the doctrine of the apportionment of rents so ably argued by counsel for plaintiff in error, but that doctrine does not dispose of the question as to whether the lands may be subdivided, nor of the question as to the payment of the rental for each gas well.

In any view that may be taken of this case, the question comes back to the point as to whether the lease is entire, and the lands and rental of gas wells indivisible; in short, whether the principle of *Wettengel* v. *Gormley* 160 Pa. 559, 28 Atl. 934, 40 Am. St. Rep. 733, is applicable, and, if so, whether it shall be followed or not. In that case the court held as follows:

"Where three tracts of land, all subject to the same oil and gas lease, are devised respectively to the owner's three children, the royalties accruing under the lease are divisible among the three devisees, although all of the wells are sunk on only one of the three tracts.

"Owing to the vagrant character of oil and gas, a lease of these substances partakes of the character of a lease for general tillage, rather than that of a lease for mining or quarrying the solid minerals."

We have several times had occasion to carefully examine and consider that case, and it has always failed to receive the approval of our judgment, and upon a reconsideration here it again fails to convince us of its soundness. And the reconsideration of the same principle in the same case in *Wettengel* v. *Gormley*, 184 Pa. 354, 39 Atl. 57, fails to strengthen the original case. Those cases were between devisees, and the question as between the lessee and purchasers from the lessor was not involved, and therefore the principle of those cases is not directly applicable here. But, even if it were, we do not regard it sound. Oil in the rock adheres to the real estate, and is a part thereof until brought to the

surface, when it becomes personalty, just as a tree, or stone, coal, or fire clay is a part of the realty until severed, when it becomes personalty. That which is a part of the land before severance belongs to the owner of the land after severance as well as before. The fact that oil and gas are vagrant and transitory in their nature does not prevent them from adhering to and becoming part of the land while passing from one tract to another, and while so in one tract they are a part of that tract, and belong to the owner thereof until they escape from such tract, and, if brought to the surface before such escape, they become personal property belonging to the owner of the land.

It therefore irresistibly follows that the oil or gas taken from a well on a particular tract of land belongs to the owner of that tract, even though the contract under which the well was drilled included other tracts of land. Because the contract of production may have included two or more tracts of land, such contract cannot have the force of taking from the owner of one tract the oil or gas adhering to such tract for the time being, and bestowing it upon the owner of another tract, where it may never have been. As oil and gas are migratory in character, no one can tell from whence they came, or whither they are going; and they must, therefore, belong to him upon whose lands they are captured. No one else can have any ownership in them, and a man can be awarded only that which he owns. *Kelley* v. *Ohio Oil Co.* 57 Ohio St. 317, 49 N. E. 399, 39 L. R. A. 765, 63 Am. St. Rep. 721. In that case this court said, on page 328, 57 Ohio St., and page 401, 49 N. E., 39 L. R. A. 765, 63 Am. St. 721:

"Petroleum oil is a mineral, and while in the earth it is part of the realty, and should it move from place to place by percolation or otherwise, it forms part of that tract of land in which it tarries for the time being, and if it moves to the next adjoining tract it becomes part and parcel of that

tract; and it forms part of some tract until it reaches a well and is raised to the surface, and then for the first time it becomes the subject of distinct ownership separate from the realty, and becomes personal property, the property of the person into whose well it came. And this is so whether the oil moves, percolates, or exists in pools or deposits. In either event it is property of and belongs to the person who reaches it by means of a well, and severs it from the realty and converts it into personalty."

The same rule applies to all property. Crops grown upon lands belong to the owner of the land, even though they may have been planted under a contract covering two or more tracts, unless the contract expressly provides otherwise. But it is urged that the lessee, having contracted to deal with but one man, cannot be compelled to deal severally with many; and that his rights in this regard must be respected. True, he contracted with one only, as to two separate tracts of land, but in the lease he agreed that his contract should extend to heirs and assigns, and, as there may be many of these, it is more convenient for him to deal with the owners of the land severally than jointly with all the owners of both tracts. The words "heirs and assigns" in such cases mean the heirs and assigns as to each tract separately, rather than the heirs and assigns as to both jointly. This is for the benefit of both parties, and enables the lessee to sell the lease as to one tract and retain it as to the other, or to sell both to different parties.

While it is true that up to the time a well was completed the $150 rental was for both tracts, the last extension expressly provides that, "When well is drilled, to draw $150." It may be that the payment of the rental of $150 for this one well would have had the effect to hold the lease on both tracts as between the original parties, or as to third parties in case the extension had been recorded; but, be that as it may, it is clear that the owner of the 40-acre tract, upon

which the well is situated, is entitled under this last extension to the rental of $150 each year for that well, and that, therefore, the judgments of the courts below are right, and are therefore affirmed.

SPEAR, SHAUCK, PRICE, and CREW, JJ., concur.

LOWTHER OIL CO. v. MILLER-SIBLEY OIL CO.
A. W. URPMAN v. LOWTHER OIL CO.

(53 West Virginia 501; 44 S. E. 433. Supreme Court of Appeals. May 2, 1903.)

[1]1. **Oil lease a right of search, only.** Title under a lease only for production of oil and gas is inchoate and contingent, and for purposes of search only until oil or gas is found. If not found, no estate vests in the lessee, and his right, whatever it is, ends when the unsuccessful search is abandoned. If found, then the right to produce becomes a vested right upon the terms of the lease. Point 2 of syllabus in Oil Co. v. Gas Co. 42 S. E. 655, 51 W. Va. 583, explained.

2. **Power of chancery to cancel oil leases** for delay of development.

3. **To constitute abandonment** by the lessee of a lease for oil there must be both an intention to abandon and actual relinquishment of the leased premises.

[2]4. **Oil in paying quantities.** Where an oil and gas lease is for a given term, "and as much longer as oil and gas can be produced in paying quantities" to the lessee, if a well pays a profit—even a small one—over operating expenses, it produces "in paying quantity," though it may never repay its cost, and the operation as a whole may result in loss. The phrase "paying quantity" is to be construed with reference to the judgment of the operator, when exercised in good faith.

[3]5. **Delay bars specific performance.** Equity will not grant specific performance of a contract to convey land when the vendee has unreasonably delayed in performing the contract and asking relief, and conditions have changed, and it would work hardship and loss to the vendor or other persons affected thereby.

6. **Vendee out of possession.** When a vendee has not possession under an executory contract of sale of land, in order to have equity to grant specific performance, he is held to greater diligence in performing the contract and asking performance than is the case of a vendee in possession under the contract.

7. **Estoppel** from conduct discussed.

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[1]*Florence Co.* v. *Orman*, 19 Colo. App. 79; 73 Pac. 628.

[2]Long delay to tender lease or change of status of the mine excuses lessee from accepting. *Kille* v. *Reading Iron Works*, 141 Pa. 440; 21 Atl. 666.

[3]*Shellar* v. *Shivers*, 18 M. R. 260. *Indianapolis Co.* v. *Teters*, 18 M. R. 391.

8. **Rescission by parole.** A written contract, sealed or unsealed, may be rescinded by word of mouth by common consent of its parties. If no possession has been taken under it, and the parties agree to rescind, and, in execution of the agreement to rescind, the vendee surrenders the writing to the vendor, the rescission is complete, and the contract at an end.

9. **Contract intended to defraud creditors.** An executory contract for the sale of land, made with intent on the part of both parties to defraud creditors, will not be specifically enforced in equity at the instance of the guilty vendee, or one to whom he has sold the land.

10. **One who buys a mere equitable title** to land is not a bona fide purchaser without notice, but takes only such title as his vendor has, and subject to all defenses good against him, though in fact such purchaser had no notice of them.

11. **Actual possession is notice** to purchasers of the rights of him in possession.

(Syllabus by the Court.)

Appeal from Circuit Court, Calhoun County; WARREN MILLER, Judge.

Action by A. W. Urpman against the Lowther Oil Company, and by the Lowther Oil Company against the Miller-Sibley Oil Company. Actions were consolidated. From the decree, Urpman and the Miller-Sibley Oil Company appeal. Affirmed.

REECE BLIZZARD, NORTHCOTT & PERRY, and MR. O'BRIEN, for appellants.

T. P. JACOBS and JOHN M. HAMILTON, for appellees.

BRANNON, J. Two chancery suits in the circuit court of Calhoun county were consolidated by order of the court (as I think they should not have been, as they involved distinct subjects), and were heard together, and a joint decree made

in the two cases. One was a suit by the Lowther Oil Company against the Miller-Sibley Oil Company; the other suit by A. W. Urpman against the Lowther Oil Company. A joint appeal from that decree was taken by Urpman and the Miller-Sibley Oil Co.

The Miller-Sibley Case.

James Metz made a lease, May 24, 1897, to Miles, for oil and gas purposes, of a tract of 250 acres of land in Calhoun county. The lease was to continue three years from date, "and as much longer as oil and gas can be found in paying quantities." It contained no provision for rental or forfeiture. It provided for payment to Metz of a royalty of one-eighth of oil produced, and $200 yearly for each gas well. It provided right to the lessee to remove machinery, and to "at any time surrender this lease and be relieved from all liability thereunder." Miles assigned the lease to the Miller-Sibley Oil Company, and it bored a well and found some oil, but by reason of tools becoming fastened in the well, or from an invasion of salt water, this well was abandoned, and another well was bored, and in it a small quantity of oil was found, its quantity being a matter of controversy, but, say, from 2¾ to 5 barrels per day. This well was pumped for oil. Two tanks were partly filled—one of 250, the other 60, barrels. The quantity of oil does not appear. The first well was pumped some, and a little oil obtained from it. The second well was pumped several months. The operations were suspended. The last pumping was in January, 1899, but a witness says that a little pumping was done in March, 1899. Some of the casing was pulled from the first well. Nearly all the casing was drawn from the second well and taken away. No tools were left. The rigs were left to decay. There were an engine and boiler left at the first well, but parts of the engine taken away,

and then an order was given to Warden by the agent of the Miller-Sibley Company authorizing him "to remove the engine, boiler, and tanks, casing, tubing, sucker rods," etc. Warden at once moved the engine only. This order was dated December 11, 1900. The two rigs were left, and a boiler and some other articles used in the business. The company owned leases on other land in the vicinity, making up, in all, 800 or 1,000 acres. This tract is stated in the lease to be a part of a block of 800 acres of leased land owned by Miles. The company drilled two wells on these other lands in developing the territory. These wells were not far from the tract of 250 acres. One of the wells produced gas, not oil. No royalty was ever paid to Metz by the Miller-Sibley Company. On January 9, 1900, Metz executed to Lowther a lease of the same tract for oil and gas purposes, and Lowther assigned this second lease to the Lowther Oil Company, and in June, 1900, that company went upon the land and endeavored to utilize the first well which had been bored by the Miller-Sibley Company, but failed, and then went to the second well bored by that company, and cleaned and pumped it, but did not succeed in producing oil in paying quantity—only one barrel a day—and then bored it to greater depth and produced oil in paying quantity. Then the Lowther Oil Company brought a chancery suit in the circuit court of Calhoun county against the Miller-Sibley Oil Company to restrain the latter company from entering on the land or interfering with the possession of the Lowther Oil Company of said land, and to declare the first lease, that made by Metz to Miles, no longer in force, and to cancel it. The decree of the circuit court avoided and canceled the first lease, and the Miller-Sibley Company appealed.

The first question is whether there was any estate vested in the Miller-Sibley Company when Metz made the second lease. The lease requires no rent, only a share of oil, and gives absolute right to the lessee to surrender it, and under

Eclipse Oil Co. v. *South Penn Co.* 47 W. Va. 27, 34 S. E. 923, gives no present vested estate, and might be ended at any time by either party, and a second lease would end it. That is the character of this lease. But when once the lessee under even such a lease begins work, whilst he yet has no vested estate, still he has right to go on in search of oil, and the lessor cannot then at mere will destroy his right. An ordinary oil lease, making the lessee pay a consideration, binding him to some obligation, vests only an inchoate right—that is, to explore for oil—but no actual other estate than right to develop; and, if he gets no oil, he still has no vested estate, but if he does get oil, he has a vested estate. Such a lease calls for the right, not to oil in place, but to extract it. *Steelsmith* v. *Gartlan,* 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107; *Lowther Oil Co.* v. *Guffey,* 52 W. Va. 88, 43 S. E. 101; Bryan on Petro. & Gas, 174, citing *Venture Oil Company* v. *Fretts,* 152 Pa. 451, 25 Atl. 732; *Colgan* v. *Oil Co.* 194 Pa. 234, 45 Atl. 119, 75 Am. St. Rep. 695. Just so with the lessee under a lease without rental or obligation after he has begun or after he has obtained oil. When he has obtained oil, he has a vested interest according to the lease. In *Oil Co.* v. *Gas Co.* 51 W. Va. 583, 42 S. E. 655, in point 2 of syllabus, is language that "mere discovery of oil by exploration under it vests no title to it in the lessee." This language is inadvertent, and does not express the meaning intended, as on page 591, 51 W. Va., page 658, 42 S. E., it is stated that discovery of oil does vest title. As above stated when the Miller-Sibley Company discovered oil, an estate vested in it according to the lease, which it could lose only by terms of the lease or by abandonment.

It is said that the oil was not in paying quantity, and therefore no estate vested. Whether the oil is in paying quantity is left to the judgment of the lessee, and I do not see that, where oil is found, its quantity is material in deciding whether any estate vested under the lease. We must

therefore see whether this estate has been lost. The lease contains no provision of express forfeiture. Under some circumstances of delay or fraudulent evasion of duty of development, equity will cancel an oil lease, as development is regarded as the real intent of the lessor, even if there be no express clause of forfeiture. *Crawford* v. *Ritchey,* 43 W. Va. 252, 27 S. E. 220; *Bluestone Coal Co.* v. *Bell,* 38 W. Va. 297, 18 S. E. 493; *Bettman* v. *Harness,* 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566; Bryan on Petro. & Gas, § 182, citing *Western Pa. Co.* v. *George,* 161 Pa. 47, 28 Atl. 1004; *Elk Fork Oil Co.* v. *Jennings* (C. C.) 84 Fed. 839. But this doctrine cannot apply under the facts of this case. We must inquire whether there has been an abandonment, for an oil lease can be lost by abandonment. The loss of valuable property by mere abandonment is not easily shown or readily held by the courts. "To constitute abandonment in respect of property, there must be a concurrence of the intention to abandon, and an actual relinquishment of the property, so that it may be appropriated by the next comer." "In determining whether one has abandoned his property or rights, the intention is the first and paramount object of inquiry; for there can be no abandonment without the intention to abandon." 1 Cyc. 4, 5. It appears to me that abandonment may be more readily found in case of oil leases than in most other cases. An oil lease is a venture, a right of exploration only, giving its owner no other rights, worthless if the search is not successful. In this instance the Miller-Sibley Company bored a well, pumped it several months, got but little oil, not filling the tanks, and abandoned that well. True, it is said that the tools getting fastened caused its abandonment; but it gave poor prospect. Then the company bored a second well, yielding from 2¾ to 5 barrels a day, though pumped for months. The company moved its tools and appliances off the Metz farm to other undertakings several miles away. It left nothing at the well very valuable

to use in further efforts. The rigs remained; but in that timber country it would not be profitable to transfer them. The casing was mostly pulled out. An engine and boiler were left for awhile, but the engine was partly dismantled, and later taken away. The agent gave an order to remove practically all left on the premises. He left the state. Wells bored on other tracts some distance away produced only gas. The search for oil in four wells in that section was unsuccessful. It was a new field—what oil men call, in homely but expressive language, "wildcat territory." March 15, 1900, Lowther wrote Miller & Sibley saying that he held various oil leases in that section, and proposing to put them in with those of Miller & Sibley, and on March 19, 1900, the Miller-Sibley Oil Company, by its president, wrote in reply, acknowledging receipt by date of this particular letter, saying, "We have decided not to operate in W. Va. for the present, and consequently do not take advantage of your offer." The Miller-Sibley Company quit work in January, 1899, practically in November, 1898, and the Lowther lease was January 9, 1900. There had been a cessation of work for a year. The lease went to record March 19, 1900. The Lowther Oil Company began work in June, 1900, more than 15 months after the Miller-Sibley Company ceased work. The oil in the tanks was not marketed, but wasted; the derrick and other parts of the rig went to decay. These circumstances, taken together, establish abandonment by the Miller-Sibley Company.

It is argued that there was no pipe line nearer than 10 miles to convey oil, and that the company made fruitless efforts to get the Eureka Pipe Line Company to extend a line to that section. This would put into the lease a condition for excuse not in it. The first lease gave Metz not a cent of return except a share of oil. His motive in making it was therefore only development. It is not reasonable, but unjust, that an oil company should thus bore two wells,

discontinue work, remove implements, do nothing for a year, give plain sign of no intent to go on, and yet hold Metz's land tied up. How long would it remain bound up so as to prevent him from contracting with others to develop? True, this may not alone show intent to abandon; but it tends to show that we ought not demand any more evidence than is manifest in the case to establish abandonment. If, as is claimed now for the purposes of this case, oil in paying quantity was found, where did the company get the right to indefinitely suspend, and not pay Metz his share of oil? Not from the lease. His right was to have the well worked or surrendered. Must we not conclude that the company regarded its search on this tract as vain, and gave it up? "Title under an oil lease is inchoate, and for purposes of exploration only until oil or gas is found, if it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned." *Calhoun* v. *Neely,* 201 Pa. 97, 50 Atl. 967.

It is contended for the Lowther Company that oil was not produced in paying quantity, and that when it went upon the premises the three-years term of the first lease had expired. To this it is answered that the lease gave a term of three years, "and as much longer as oil and gas can be produced in paying quantities." What is meant by that provision? It means paying quantity to the lessee. "If the well pays a profit, even small, over operating expenses, it produces in paying quantity, though it may never repay its cost, and the operation, as a whole, may result in a loss. The phrase 'paying quantities,' therefore is to be construed with reference to the operator and by his judgment, when exercised in good faith." *Young* v. *Oil Co.* 194 Pa. 243, 45 Atl. 121; Bryan, Petro. & Gas, 109. The case further says that if oil or gas is not found, and the lessee is not willing to go on and incur further expense, the condition stipulated for the termination of the lease has come: so, if he finds oil, but ceases to pay

expense of production. The lessor cannot determine whether oil is in paying quantity; neither can a subsequent lessee. There is no strength in the argument that the lease ended alone from want of oil in paying quantity. Still, we may consider quantity in coming to a conclusion as to whether the lessee abandons.

It is suggested that the word "can," in this quantity phrase, is different from the word "is," commonly used. I do not see any appreciable force in the suggestion. Does it import a power in the lessee to leave the wells and premises indefinitely? I see no error in the decree so far as respects this case.

The Urpman Case.

James W. Metz, father of John W. Metz, made a written agreement, January 22, 1892, selling and binding himself to convey to John W. Metz a tract of 70 acres of land for $800, of which the document says $450 was paid in mules, cows, and a wagon, and for the balance John W. Metz gave three notes, payable yearly thereafter, which agreement was recorded on its date. The tract is a part of the tract of 250 acres leased by James W. Metz to Miles, and then to Lowther, and operated by the Miller-Sibley Company and then by the Lowther Oil Company, as stated above in the Miller-Sibley case. By deed dated February 16, 1901, John W. Metz conveyed said 70 acres to A. W. Urpman. Urpman brought a chancery suit against the Lowther Oil Company, James W. Metz, and others to enforce specific performance against James W. Metz of said executory contract of sale made by James W. Metz to John W. Metz, by compelling James W. Metz to pass a legal title to the 70 acres to Urpman. James W. Metz having leased the tract of 250 acres to Lowther for oil, including said 70 acres, and Lowther having assigned the lease to the Lowther Oil Company, and the said company

having gone upon the premises and bored and found oil a short time before the date of the conveyance of the 70 acres from John W. Metz to Urpman, Urpman's chancery suit also sought to enjoin the Lowther Oil Company from taking oil, and to annul the lease under which it was operating as a cloud on Urpman's title. The Lowther Oil Company answered Urpman's bill, relying upon the validity of the lease from James W. Metz under which it was operating, and in turn prayed that the agreement of sale between James W. and John W. Metz, and the deed from John W. Metz to Urpman, be canceled and annulled and declared void as to its rights. The decree did declare them void as to the Lowther Oil Company and James W. Metz, and Urpman appealed.

The contract between James W. Metz and John W. Metz being on record, the rights of Lowther and the Lowther Oil Company under the second lease would be later and subordinate to rights under that sale agreement, if enforceable. No possession was taken under it by John W. Metz. This is an important fact bearing on delay in failing for more than nine years to enforce the agreement; for, when a vendee is in possession, delay is more excusable, and time does not so soon bar his right. *Abbott* v. *L'Hommedieu,* 10 W. Va. 678; Pomeroy on Contracts, § 404; 2 Warv. on Vendors, § 746; *Tate* v. *Pensacola* (Fla.) 20 South. 542, 53 Am. St. Rep. 251; Fry on Specif. Perform. § 738. When in possession, we can almost say time is no matter; but, when he is not, it is far different. Why, if he has a just right to possession, is he not in? If John W. Metz had good claim for the 70 acres, why remain out of possession over nine years, and buy and live on another tract in the neighborhood, as he did? His delay constituted confession of no just right. The application for specific performance of a contract is addressed to the sound discretion of the court. He who asks it must have shown himself

prompt and willing to comply with the contract on his part, and it will not be granted if it would be inequitable and work hardship towards the party against whom it is asked. *Dyer* v. *Duffy,* 39 W. Va. 148, 159, 19 S. E. 540, 24 L. R. A. 339. The rule is more strictly applied in specific performance than in suits for account. *Coal Co.* v. *Bell,* 38 W. Va. 297, 18 S. E. 493. If since the contract the value of the land has greatly increased, and the condition changed, or the vendor is in a condition where enforced performance would greatly damage him, and especially where the purchaser is chargeable with the delay by reason of failure to perform, equity will refuse to compel the vendor to convey. *Bootten* v. *Scheffer,* 21 Grat. 474; *Patterson* v. *Martz,* 34 Am. Dec. 474; *Vail* v. *Nelson,* 4 Rand. 478. In volume 1, p. 181, of that late valuable equity work, Am. & Eng. Dec. in Equity, many instances of short delay barring relief are given and the subject discussed. "Laches does not, like limitation, grow out of the mere passage of time; but it is founded upon the inequity of permitting the claim to be enforced. An inequity founded on some change in the conditions or relations of the property or parties." *Galliher* v. *Cadwell,* 145 U. S. 368.

Let us pause to bring in some facts of the case in connection with these principles. The purchaser delays over nine years. He does not pay any of the $325 deferred purchase money, and thus was never in a condition to call for a deed. About five or six years after the sale, oil interests increase the value beyond comparison with the value of the land at the date of the sale. The purchaser still pays nothing, but lets four more years go by without asking performance—he right near his father in the neighborhood; his father all the time in possession, using the land as his own; this son and purchaser being weekly at his father's, and knowing of his father's use of the land. In fact, he rents the land of his father one or two seasons for cropping, paying a share of the crop. His father leases the land to Miles for oil, and under

the lease the Miller-Sibley Oil Company bores two wells. The purchaser utters not a whisper against it, though well knowing it, and often visiting the land during oil operations. The father makes a second lease to Lowther under which the Lowther Oil Company develops oil. The purchaser is present when this lease is made, well knowing of it, frequently on the land during the operations, standing by and seeing the oil company spend large amounts of money, and giving forth not a whisper of protest; even when oil gushed out as from a cornucopia of wealth, asking no deed from his father. Suppose this purchaser were himself to ask a court to compel his father to make a deed. What court would give him a deed? Urpman has only Metz's rights—no more. His father had made a binding covenant by his second lease, which would ruin him if broken by giving a deed to the son or Urpman. And then it would entail great loss on the Lowther Oil Company in favor of John W. Metz, when he stood silent on the ground when it was spending thousands of dollars. As to the oil company, a decree of performance would violate that principle of estoppel *in pais* which says: "No principle of equity seems better established, or more readily applied in equity, than that if a person, knowing his rights, stands by and encourages or permits an innocent party to purchase his property or to make valuable improvements upon it without making known to such purchaser his rights in the property, he is estopped from afterwards asserting any claim to it." *Heavener* v. *Godfrey* 3 W. Va. 433; *Norfolk & Western Railroad Co.* v. *Perdue,* 40 W. Va. 442, 21 S. E. 755. We must not think that the rights of a stranger to the contract are not to be considered in a contest as to its performance between its parties; for often the fact that its enforcement will impose loss on a stranger will deny a decree to enforce it, even where no such estoppel as that just mentioned is present. *Anthony* v. *Leftwich,* 3 Rand. 238.

Another reason against the decree of performance is that the agreement of sale, if ever complete, was rescinded by

both vendor and vendee. The contract states that the price of the land was to be paid in stock and a wagon and in three notes. James Metz never got the stock, but his son took it off to Roane county and sold it for his own use, and he never executed the notes, and he never took possession of the land, and he later surrendered to his father the written agreement. The motive of sale was base. John W. Metz, being in debt, in order to get the personal property out of his hands, away from creditors—to delay them until he should become able to pay them—went through the form of paying it to his father on the land, making a sale document, and recording it. He did not deliver the personal property. Was it ever a consummated contract? It seems not. If so, no rights come from it. But pass that feature. They afterwards rescinded. But was that oral rescission good? It is not a deed passing legal title. That can only go back by deed. Such a written contract may be rescinded by word of mouth, if the contract be destroyed pursuant to agreement, or possession be returned. *Cunningham* v. *Cunningham,* 46 W. Va. 1, 32 S. E. 998. Now, the surrender to its maker of the written contract with intent to rescind is surely tantamount to actual destruction. "It has been held in some of the earlier cases that an agreement to rescind is as much an agreement concerning land as the original contract, and hence should be in writing; but all the later cases, both in England and the United States, are unanimous in affirming that a contract in writing may, in equity, be rescinded by parol; and this even though the contract may have been under seal. Such rescission may be effected not only by an express agreement, but by any course of conduct clearly indicating a mutual assent to the termination or abandonment of the contract. It may consist either of words or acts and all the circumstances attending the transaction may be shown to prove intention; but, if evidenced by acts alone, they must be such as to leave no doubt as to such intention." 2 Warv. on Vendors, § 826. See *Ballard* v. *Ballard,* 28 W. Va. 470, and *Starley* v. *Perdue,* 33 W. Va. 375,

10 S. E. 780, holding these principles. Not merely James W. Metz, but John W. Metz, waived, abandoned, and ignored this contract long ago,—long before Urpman got his deed,—and this abandonment defeats specific performance. *Payne* v. *Graves,* 5 Leigh, 561. "The rule seems to be well established that specific performance will not be decreed of a contract which the parties have treated as rescinded, or which has once been repudiated by the parties." Warv. on Vendors, § 758. In section 759 such rescission is stated to be a bar to specific performance.

There is another all-sufficient ground to refuse Urpman specific performance. The contract which he asks equity to enforce is not executed, but executory. It was made with intent to defraud creditors, and equity will neither enforce nor cancel it, but leave the parties alone. "This rule applies not only to the original parties to the fraudulent transaction, but also to their heirs and all parties claiming under or by title derived from them, where no equitable rights intervene to protect such parties." *McClintock* v. *Loisseau,* 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 816. See *Slifer v. Howell's Adm'r,* 9 W. Va. 391. There are other reasons, however, for a decree declaring this agreement void as to the Lowther Oil Company. It is true, Urpman had no notice of the fraud infecting the sale contract, but his deed conveyed only an equity, and a purchaser of only an equity gets only such title as the vendor has. Such a purchaser, knowing that the legal title is outstanding, is not a bona fide purchaser, like one getting a legal title. The fact that the legal title is not in his vendor is notice of the risks he assumes in buying a mere equity, and he takes only what his vendor can convey, or that which his vendor can call upon a court of equity to convey to him. He takes the equity with all its infirmities upon its head, subject to all defenses to which it was subject in the hands of his vendor. *Briscoe* v. *Ashby,* 24 Grat. 478; *Walton* v. *Hargroves,* 97 Am. Dec. 429, note 433; *York* v. *McNutt,* 67 Am. Dec. 607.

In view of the several reasons ample of themselves to justify the decree denying Urpman relief by specific performance, I will add another equity principle, and that is that specific performance in courts of equity is not a matter of absolute right, as arising from a debt of justice, but lies only in a sound discretion of the court. The court has a right to look at all the circumstances, and say whether justice and right demand a grant of performance of it. Hogg's Eq. § 396; *Abbott* v. *L'Hommedieu,* 10 W. Va. 677. Surely, under all the facts, we cannot say that such discretion was improperly exercised.

It is argued that as the sale agreement was on record, and the rescission of the agreement was not, the latter cannot prevail, as there is no notice to Urpman. The record of the agreement has nothing to do with the case. It would only concern purchasers from James W. Metz, not John W. It is no factor on the questions whether the agreement was rescinded, or was fraudulent, or whether there was laches. Of course, the rescission, being oral, could not be recorded.

Under the above-stated legal principle that specific performance rests in the sound discretion of the court, in addition to the facts already given, as further reason to justify denial of relief to Urpman I state that no injustice is done to him because he purchased when he had notice of the right of the Lowther Oil Company by their lease on the open record, by actual possession of the land by the Lowther Company, and by communications from John W. Metz. Why did he buy, knowing of the possession of the Lowther Oil Company, and its operations? As Judge Green beautifully expressed the doctrine in *Frame* v. *Frame,* 32 W. Va. 478, 9 S. E. 907, 5 L. R. A. 323: "The earth has been described as that universal manuscript open to the eyes of all. When a man proposes to buy or deal with realty, his first duty is to read this public manuscript—that is, to look and see who is there upon it, and what are his rights." Possession is notice to the world

of the rights of the occupant. *Ellison* v. *Torpin,* 44 W. Va. 414, 30 S. E. 183. Besides notice constructive, Urpman was actually on the ground and saw the Lowther Company operating. And besides, Urpman, seeing the sale contract on record, conceived the project of defeating the Lowther Oil Company by purchasing of John W. Metz, sent for him to come to Grantsville, and proposed to purchase of Metz, when Metz told him he had no right—did not own the land; but Urpman said, "We think you have," and insisted on buying, and had Metz to execute a deed with special warranty, he refusing to warrant, for the consideration of $1,500, when the land was worth thousands more, and, it being then night, took a notary upwards of three miles to Metz's home, and got his wife's signature at the midnight hour, seeming fearful that the Lowther Oil Company or some one might intervene. He gave checks to one Matthews to hold till the notary returned with the deed. Metz says he was intoxicated. This is denied by evidence. But say that he was lured by this amount of money—to him, an unlettered mountaineer, a big sum. He soon repented of bringing trouble upon his aged, decrepit father, afflicted with dropsy, and asked Urpman to take back his checks, as he would lose nothing. It seems the money is in the hands of Matthews, and that Metz has never received it. These things Metz swears to, and Urpman did not go on the stand to deny. What has Urpman lost? Where is injustice done to him? Anyhow, no one is to blame but himself; for he, not John W. Metz, conceived the transaction and was the active agent. It was a speculation that failed. That is all.

We must therefore affirm the decree.

PATRICK CLARK ET AL v. BUFFALO HUMP MINING CO.

(122 Federal 243. Circuit Court of Appeals. Ninth Circuit. May 4, 1903.)

[1]**The knowledge of adjoining values acquired by a mining superintendent or manager is the property of his employer, the company.**

Application of the above rule. No relief where fraud on both sides. The owners of idle ground adjoining a deep working mine operated by a corporation conveyed a fifth interest in such idle ground to the company superintendent in consideration of his agreement to keep them posted in case the workings as they approached such ground indicated that the ore values extended into such idle ground. The operations of the company developed value in that direction which the superintendent concealed from his grantors the owners and on the contrary represented that the ground was "no good" and on such statement the company bought the other four-fifths for an apparently inadequate consideration. Complainants brought their bill to set this latter conveyance aside: *Held*, that their case was tainted by their attempt to obtain from the superintendent, knowledge of value which he could not rightfully sell or impart to strangers and that the court would not balance frauds between two wrongdoers.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Idaho.

STOLL & MACDONALD, for appellants.

W. B. HEYBURN, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

Ross, Circuit Judge. The appellants were complainants

[1]See *Calumet Co.* v. *Philips*, 22 M. R. 677 and notes.

In *Edelman* v. *Latshaw*, 18 M. R. 608, the court held the knowledge of value of certain stock contained in a certain letter was the property of the assignee of the stock and not of the party to whom it was addressed or his legal representative.

in the court below, where they brought the present suit to procure the cancellation of a deed of an undivided four-fifths interest in the Ella and Missing Link lode mining claims situated near the town of Burke, Shoshone county, Idaho, and to compel a reconveyance thereof, together with incidental relief; the suit being based upon the charge that the deed was procured from them by the defendant the Buffalo Hump Mining Company through the fraud of its representatives, Charles Sweeney and F. R. Culbertson, of which fraudulent acts the defendant Empire State-Idaho Mining & Developing Company had knowledge at the time of its purchase from its codefendant.

It appears from the record that the Tiger and Poorman mines were very extensively worked, but separately, from the year 1885 to 1895, and that from 1887 to 1895 the complainant Patrick Clark was the general manager in charge of the Poorman mine for its then owner, the Cœur d'Alene Silver Lode Mining Company, and had sole charge of its development. During that time Patrick Clark and his cocomplainants acquired title to the fractional piece of mining ground lying between the Poorman claim and the O'Neill claim, known as the Ella and Missing Link mining claims. During the same time the owner of the Poorman mine also owned an interest in the O'Neill claim, and Patrick Clark, in the course of his operation of the Poorman mine, ran several drifts from the Poorman through the Ella and Missing Link claims into the O'Neill claim, one of which was on the 1,200 foot level of the Poorman mine. From about the year 1895 the Tiger and Poorman claims were operated together under the ownership of the Tiger & Poorman Consolidated Mining Company, the grantor of the defendant the Buffalo Hump Mining Company, under the superintendency of F. R. Culbertson, and have since been worked by the defendants in turn.

The case shows that the Tiger mine lies on the mountain to

the west of Canyon creek, immediately to the east of which is the Poorman mine, embracing within its limits the bed of that creek, and extending about 500 feet further up the mountain. The Ella claim joins the Poorman on the east, and the Missing Link joins the Ella on the east, both of which latter claims are located on the mountain, more than 1,200 feet above the level of Canyon creek. In their bill the complainants allege that during the summer and fall of the year 1899 the defendant the Buffalo Hump Mining Company was mining the Tiger and Poorman mines extensively, and had a combination shaft therein, called the "Combination Tiger and Poorman Shaft," which began at about the level of Canyon creek, and extended down a distance of 1,600 feet below the surface of the ground; and that "the said defendant the Buffalo Hump Mining Company was entitled to the exclusive possession of all the workings within the said Tiger and Poorman mines, and no other persons than the owner, or those authorized by it, were entitled to have access to or gain access to the workings therein, or to any information concerning such workings, or the condition or value or extent of the ore reserves therein, or in any part thereof." The case shows that at the time Sweeney was the general manager and Culbertson the superintendent of the defendant the Buffalo Hump Mining Company in its mining operation here spoken of. Yet in their bill the complainants themselves allege:

"That about the 6th day of February, 1896, your orators had agreed to convey, and by conveyances duly executed between the 6th day of February, 1896, and the 25th day of August, 1899, had conveyed, to said F. R. Culbertson an undivided one-fifth interest in and to the Ella lode mining claim, and an undivided one-fifth interest in and to the Missing Link lode mining claim hereinbefore described, under the circumstances and for the consideration following, to wit: The said F. R. Culbertson, in the year 1896, assumed the management of the Consolidated Tiger & Poorman Mining Company, and had access to the underground workings of the mines belonging to said company; and your orators had no authority to enter into the under-

ground workings of the property belonging to said Consolidated Tiger & Poorman Mining Company, and it was agreed by and between your orators and the said F. R. Culbertson that they would convey to the said F. R. Culbertson the said undivided one-fifth interest in the Ella and Missing Link lode mining claims for the sole purpose of compensating the said F. R. Culbertson for his services in watching the said mining claims; and, in the event that in the workings of the Poorman mine any ore body should be struck so near the Ella mine as to be probable that the same extended into and through the Ella, an interest in which was so conveyed to the said F. R. Culbertson, that he should advise your orators of that fact; and that there was no other or further consideration for the conveyance so executed by your orators to the said F. R. Culbertson; and the said F. R. Culbertson accepted such conveyances as his compensation therefor—which arrangement and understanding was well known to the defendant the Buffalo Hump Mining Company at all the times herein mentioned."

There is nothing in the evidence in the case tending to show that the defendant the Buffalo Hump Mining Company ever had any knowledge of any such agreement or arrangement. The fraud complained of by the complainants is in short, that Sweeney, the general manager, and Culbertson, the superintendent of the Buffalo Hump Mining Company, while in charge of the underground workings of the Tiger-Poorman mine, by means of diamond drill holes and a crosscut started in the ground owned by the defendant the Buffalo Hump Mining Company, but extended into the Ella and Missing Link claims, discovered valuable ore bodies in those fractional claims belonging to the complainants, and then entered into a conspiracy to obtain for the defendants the complainants' interest in the Ella and Missing Link claims by concealing from them the information so obtained, and by falsely representing to them that the claims were "no good," and that Culbertson had sold his interest therein to the defendants for $500.

Part of the information, at least, so obtained by Culbertson, was obtained in his legitimate employment by the defendant the Buffalo Hump Company. To that the complainants were

neither legally nor morally entitled. Yet they themselves allege that for an undivided one-fifth interest in the Ella and Missing Link claims, which they conveyed to him, Culbertson agreed to give to them information concerning the development in his employers' mine bearing upon the prospective value of their own. To that information the complainants were not entitled. It belonged exclusively to the defendant the Buffalo Hump Mining Company. The withholding from the complainants by Culbertson of such information constitutes a part of the grievances of which the complainants complain. To what extent, it is not important to inquire. Such being the case, the court below properly refused them relief, regardless of the grounds upon which its judgment was based. A court of equity will not undertake to balance frauds between complainants and defendants, but shuts its doors against those who come without clean hands asking its aid.

The judgment is affirmed.

THE CALUMET MINING & MILLING CO. v. JAMES B. PHILLIPS.

(31 Colorado 267; 72 Pac. 1064. Supreme Court. May 5, 1903.)

[1]**Agent using knowledge of value where his company declines to use it.** Defendant while manager and a director of the defendant company, in sinking a shaft for the company, discovered a vein which he considered of sufficient value to induce him to purchase a location which was supposed to cover such vein, outside the territory of the company. The policy of his company was to not acquire any further property and there was no conflict of title between the two properties: *Held*, that there was no unlawful use of knowledge officially acquired such as would raise any trust for the benefit of the company.

Appeal from District Court, Gilpin County.

Action by the Calumet Gold Mining & Milling Company against James B. Phillips. From a judgment for defendant, plaintiff appeals. Affirmed.

BULLIS & WILLIAMS, for appellant.

[1]Compare *Clark* v. *Buffalo Hump Co.* 22 M. R. 672.

Location of lode by late employee from knowledge obtained while working his employer's mine, sustained. *Thallmann* v. *Thomas*, 21 M. R. 573.

An agent to locate for his principal cannot locate in his wife's name. *Largey* v. *Bartlett*, 18 Mont. 265; 44 Pac. 962.

Case of purchase of mine at administrator's sale construed as questionable but not fraudulent. *Gray* v. *Quicksilver Co.* 68 Fed. 677.

"The fraud perpetrated by the agent on his principal did not affect the rights of the co-tenants of such agent as between them and such principal." *Fisher* v. *Seymour*, 23 Colo. 542; 49 Pac. 30.

A location may be made by an agent. *McCulloch* v. *Murphy*, 125 Fed. 147.

Where an agent makes a secret profit on a mining sale the adventurers who raised the funds may sue jointly though their interests are unequal. *Humbird* v. *Davis*, 210 Pa. 311; 59 Atl. 1082.

E. W. HUELBUT and H. A. HICKS, for appellee.

Mr. JUSTICE GABBERT delivered the opinion of the court.

Appellant commenced an action in the court below to have the title to the Rosebud mining claim, standing in the name of appellee, declared held in trust for its benefit. From a judgment in favor of the defendant, plaintiff company appeals.

The only proposition advanced by counsel for appellant going to the merits of the case necessary to consider is, that appellee obtained title to the property in dispute during the period when fiduciary relations existed between the parties of the character which, in law, would make the appellee the trustee of plaintiff for such property. In support of this proposition we are referred to the familiar rule, that an agent cannot make a profit for himself out of the business in which he is engaged for his principal, or make use of the information obtained through his employment to acquire interests in the subject-matter of his agency adverse to those of his principal. It appears from the testimony that the plaintiff company owned a group of mining claims which it was having developed under the management of the defendant, who was also one of its directors; that in sinking a shaft on the property of the company a vein was disclosed which, it is claimed, was the one upon which the Rosebud is located, and that defendant thereafter and during the existence of his agency obtained title to the Rosebud claim. This claim conflicts with two belonging to the plaintiff. The shaft in question is not within the boundaries of the Rosebud. It does not appear that the title to any of the veins upon which the claims of plaintiff are based is in the least affected by the Rosebud location, or that it does not, in fact, own the surface of such conflicts as well as all veins apexing therein. The company was not engaged in acquiring any adjacent territory; in fact, according

to the testimony, it was not its policy to purchase any additional mining claims. According to these facts, the rule of law invoked by plaintiff has no application. The inhibition against the agent engaging in transactions for his own benefit when limited to that question alone, only extends to the business of his agency. Mechem on Agency, § 456; 1 Enc. Law, 2 ed. 1072.

So far as advised from the record, it does not appear that by purchasing the Rosebud the defendant has acquired any interest whatever in the conflicts between that claim and those belonging to the plaintiff, either surface or mineral. It does not appear, therefore, that defendant, by acquiring title to the Rosebud, engaged in the business of his principal for his own benefit, or has made use of any information obtained through his employment, to acquire an interest in the property of his employer adverse to its interests.

Other errors are assigned and argued, but as they do not affect the cause upon its merits, they are not discussed. The judgment of the district court is affirmed.

Judgment affirmed.

RILEY R. GADBURY ET AL v. OHIO & INDIANA CONSOLIDATED NATURAL AND ILLUMINATING GAS CO.

(162 Indiana 9; 67 N. E. 259. Supreme Court. May 14, 1903.)

[1]**Implied covenant to operate.** Where the substantial consideration of an oil and gas well is the expected royalties there is an implied condition that the well will be operated.

One dollar is technically a valuable consideration but even if paid the courts will look to the substantial reasons prompting the making of the grant.

[2]**To the rule that equity will not enforce a forfeiture** an idle gas or oil well lease is an exception.

Plugging well after gas struck. A lessee under implied covenant to operate may not plug the well after gas is struck.

Failure for two years of the grantee of the oil and gas in land to develop it, after constructing a well, finding gas, and then closing it, *prima facie* authorizes the grantor, who was to be paid $100 a year for each well while gas was being used off the premises, without demand, to treat the grant as abandoned.

Appeal from Circuit Court, Blackford County; E. C. VAUGHN, Judge.

Action by Riley R. Gadbury and another against the Ohio

[1]*Maxwell* v. *Todd*, 112 N. C. 677; 16 S. E. 926. *Aye* v. *Philadelphia Co.* 20 M. R. 177.

[2]Equity does not abhor a forfeiture where forfeiture is necessary to do equity. *Brown* v. *Vandegrift*, 80 Pa. 142. Tender of rent will not restore lessee's rights after abandonment. *Rawlings* v. *Armel*, 70 Kans. 778; 79 Pac. 683.

Circumstances of case stated on which the Court held no such breach of covenant for efficient work as to create a forfeiture. *Matthews Co.* v. *New Empire Co.* 122 Fed. 972.

Lessee may delay a reasonable time. *Lowther Co.* v. *Guffey*, 22 M. R. 545.

There is no implied forfeiture for breach of covenant to not assign the lease. *Rose* v. *Lanyon Z. Co.* 68 Kans. 126; 74 Pac. 625.

Where forfeiture is provided for breach of certain covenants breach of other covenants creates no forfeiture. *Id.*

& Indiana Consolidated Natural & Illuminating Gas Company. Judgment for defendant. Plaintiffs appealed to the Appellate Court, whence the case is transferred, under Burns' Rev. St. 1901, § 1337j, subd. 2. Reversed.

HINDMAN & POWELL, for appellants.

W. W. ORR, S. W. CANTWELL and L. B. SIMMONS, for appellee.

GILLETT, J. By their second paragraph of complaint, appellants seek to quiet their title to a certain tract of real estate, which they allege that they own in fee simple. The cloud that they seek to have removed was occasioned by the execution of a written contract by them and appellee's grantor, one Andrews, which contract is in the words and figures following:

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, we, R. R. Gadbury and J. A. Gadbury, first parties, hereby grant unto J. S. Andrews, second party, its successors and assigns, all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil, gas or water, and to erect and maintain all buildings and structures and lay all pipes necessary for the production and transportation of oil, gas or water from said premises, excepting and reserving, however, to the first parties one-sixth (⅙) part of all oil produced and saved from said premises to be delivered in the pipe line with which second party may connect his wells, namely: All that certain lot of land situate in the township of Licking, county of Blackford, in the state of Indiana, bound and described as follows, to wit:

"The east half of the northwest quarter of section thirty-two, township twenty-three, north, range ten, east, containing eighty acres, more or less.

"To have and to hold the above premises on the following conditions: If gas only is found, second party agrees to pay one hundred dollars each year for the product of each well while the same is being used off the premises, and the first party to have gas free of cost for domestic purposes.

"Whenever first party shall request it, second party shall bury all oil and gas lines and pay all damages done to growing crops by reason of burying and removing said pipe lines.

"No wells shall be drilled nearer than two hundred feet to the house or barn on said premises, and no well shall occupy more than one acre. In case no well is completed within forty days from this date, then this lease shall become null and void, unless second party shall pay to first parties one dollar per day thereafter such completion is delayed. The second party shall have the right to use sufficient gas, oil or water to run all necessary machinery for operating said wells, and also the right to remove all its property at any time. It is understood between the parties to this agreement that all the conditions between the parties hereto shall extend to their heirs, executors and assigns.

"In witness whereof, the parties hereto have hereunto set their hands and seals this 1st day of December, A. D. 1897.

"[Signed] R. R. GADBURY,
"J. A. GADBURY,
"J. S. ANDREWS."

Said paragraph of complaint further alleges that said contract was assigned by said Andrews to said defendant on the 6th day of January, 1900; that there was no consideration for the execution of said contract by plaintiffs, except the income, rents, profits, and royalties referred to in said instrument; that said Andrews completed a well on said premises on the 19th day of February, 1898, and paid plaintiffs the sum of $1 per day during the time that completion of said well was delayed after 40 days from the execution of said contract down to the date last aforesaid; that, by the construction of said well, gas was found on said premises in large and paying quantities; that notwithstanding the discovery of said gas as aforesaid, said Andrews, immediately upon the completion of said well, closed and anchored the same, so as to prevent any gas from escaping therefrom, and neither said Andrews nor said defendant, nor any other person or corporation, has produced any gas or oil on or from said premises, nor have they, or either of them, used or transported any gas whatever from said premises; that

neither said Andrews nor said defendant has ever paid the plaintiffs anything for the product of said well, or for the privilege of holding said premises after the completion of said well; and that the defendant since the date of said assignment has held, and still claims the right to hold, said premises without developing the same, and without producing any oil or gas therefrom, and without paying the plaintiffs any consideration whatever for the privilege of so doing, and without paying the plaintiffs anything whatever for the gas and oil which could be produced upon said premises; that during all of the time since the execution of said lease, gas and oil have existed in and under said premises in large and paying quantities, and still continue so to exist, all of which was known to said Andrews and said defendant during all the time since the execution of said lease. It is further alleged in said paragraph of complaint that said Andrews and said defendant failed, neglected, and refused to give or furnish plaintiffs, or either of them, with any gas for domestic use; that on the 28th day of December, 1899, plaintiffs declared said contract forfeited, and all rights thereunder terminated, by reason of a failure to develop said premises and to produce gas or oil therefrom, and that plaintiffs did then and there take possession of said well, and connect the same with their dwelling house on said premises; and that said contract is a cloud upon plaintiffs' title. Prayer that said title be quieted. A demurrer was sustained to said paragraph of complaint, and an exception was duly reserved; and from a final judgment that appellants take nothing, they appeal, and assign error based on said ruling.

The grant in question, upon its face, appears to be a mere option to the grantee. Every express undertaking upon his part is subsidiary to the exercise of the option to explore and develop the real estate. The question arises, however, whether obligations to explore and develop the property may not be implied, and whether such undertakings, if implied,

are not such an essential part of the contract as to be treated as conditions. An implied condition may be inseparably annexed to a grant, from its essence and constitution, although no condition be expressed in words. 2 Black. Com. p. *152; *Petroleum Co.* v. *Coal, etc., Co.* 89 Tenn. 381, 18 S. W. 65.

In determining whether a condition is to be implied, it is important to note that the substantial consideration which moves a grantor to execute such a grant is the hope of profits or royalties if oil or gas is discovered. Even if the grantee in this case had paid the stated consideration of $1—a technically valuable consideration—yet we must construe the instrument with the fact in view that a more substantial reason or reasons prompted the making of the grant. *Huggins* v. *Daley,* 40 C. C. A. 12, 99 Fed. 606, 48 L. R. A. 320; *Federal Oil Co.* v. *Western Oil Co.* (C. C.) 112 Fed. 373. In an ordinary agricultural lease, where the rent is payable in kind, it would, of course, be implied that the tenant would farm the land; and the requirement is implied that lessees in mineral leases, upon royalties, will develop the property, if exploration warrants it, where the minerals are stable, although the only result of delay in operating would be to postpone the receipt of profits or royalties. *Island Coal Co.* v. *Combs,* 152 Ind. 379, 53 N. E. 452; *McKnight* v. *Nat. Gas Co.* 146 Pa. 185, 23 Alt. 164, 28 Am. St. Rep. 790. If a duty to operate is to be implied in such cases, there is much more reason for the implication in a grant of the right to operate for oil and gas upon a royalty, owing to the migratory habit of the fluids. "Oil leases," it was declared in *McKnight* v. *Nat. Gas Co., supra,* "must be construed with reference to the known characteristics of the business." As said in another Pennsylvania case: "The nature of oil and gas, the pressure of the superincumbent rocks, and the vagrant habit of both fluids under the influence of this pressure, enter into the contemplation of both parties to such an agreement." *Kleppner* v. *Lemon,* 176 Pa. 502, 35 Atl. 109.

In grants of the character in question, the title is inchoate, and for the purpose of exploration only, until oil or gas is found in quantities warranting operation; and while the courts manifest a disposition to protect the grantee at this stage, by treating his interest as no longer postponed to the happening of a condition precedent, yet it is thoroughly settled that he cannot omit to develop the property and hold the grant for speculative purposes purely. *Parish Fork Oil Co.* v. *Bridgewater Gas Co.* 51 W. Va. 583, 42 S. E. 655; *Bluestone Coal Co.* v. *Bell,* 38 W. Va. 297, 18 S. E. 493; *Guffy* v. *Hukill,* 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901; *Ray* v. *Nat. Gas Co.* 138 Pa. 576, 20 Atl. 1065, 12 L. R. A. 290, 21 Am. St. Rep. 922; *Venture Oil Co.* v. *Fretts,* 152 Pa. 451, 25 Atl. 732; *Kleppner* v. *Lemon, supra; Huggins* v. *Daley,* 40 C. C. A. 12, 99 Fed. 606, 48 L. R. A. 320; *Federal Oil Co.* v. *Western Oil Co.* (C. C.) 112 Fed. 373; *Hawkins* v. *Pepper,* 117 N. C. 407, 23 S. E. 434.

The duty to develop the property upon the discovery of oil or gas in paying quantities is not to be regarded as a mere implied covenant, but, in a case like this, where practically the whole consideration must depend upon the implied undertaking, is to be treated as a condition subsequent. Conditions subsequent are not ordinarily favored, "because," as declared by Prof. Kent, "they tend to destroy estates, and the rigorous exaction of them is a species of *summum jus,* and in many cases hardly reconcilable with conscience." 4 Kent's Com. p. *129. Accordingly, it has been declared in unrestricted terms that equity will not lend its aid to enforce a forfeiture. Where there has been a cause of forfeiture, followed by an entry upon the part of the grantor, so that the title has been lost, it is not strictly the enforcing of a forfeiture for a court of equity to decree a cancellation of the instrument. *McClellan* v. *Coffin,* 93 Ind. 456; *Birmingham* v. *Lesan,* 77 Me. 494, 1 Atl. 151. But even in a case of this kind, where the cir-

cumstances do not permit of an entry, the forfeiture may be, in effect, enforced by suit in equity. Forfeitures are usually against conscience and without equity, and it is for these reasons that courts of chancery ordinarily refuse relief in such cases, but an exception to the rule must exist where it is against equity to permit the defendant longer to assert his title. *Leach* v. *Leach,* 4 Ind. 628, 58 Am. Dec. 642; *McClellan* v. *Coffin,* 93 Ind. 456; *Richter* v. *Richter,* 111 Ind. 456, 12 N. E. 698. In the last case cited a stipulation was treated as a condition subsequent, rather than a covenant, and the grantor's title quieted, because of the lack of another remedy. In the case in hand specific performance could not be enforced (*Louisville, etc., R. Co.* v. *Bodenschatz,* 141 Ind. 251, 39 N. E. 703); and the completion of the first well having cut off the liquidated damages of $1 per day for noncompletion and as no gas has been disposed of off the premises, there remains no measure of damages, for, while the damages would be substantial, they would be speculative. *Foster* v. *Elk Fork, etc., Co.* 32 C. C. A. 560, 90 Fed. 178; *Federal Oil Co.* v. *Western Oil Co.* (C. C.) 112 Fed. 373. The lack of any other remedy, and the danger that the gas might be withdrawn through wells on other lands, makes a case of this kind appeal to the conscience of the chancellor, and calls upon him to enforce the incurred forfeiture by removing the cloud from the title. In *Munroe* v. *Armstrong,* 96 Pa. 307, it was said concerning a gas and oil lease: "Forfeiture for nondevelopment or delay is essential to private and public interests in relation to the use and alienation of property. In such cases as this, equity follows the law. In general, equity abhors a forfeiture, but not when it works equity and protects a landowner from the laches of a lessee whose lease is of no value till developed."

The next question that arises is whether the paragraph of complaint in question sufficiently shows that the interest conveyed by appellants to said grantee Andrews has been

forfeited. An estate is not *per se* forfeited by the breach of a condition subsequent. *Cross* v. *Carson,* 8 Blackf. 138, 44 Am. Dec. 743; *Thompson* v. *Thompson,* 9 Ind. 323, 68 Am. Dec. 638. It was a rule of the common law that, where an estate commenced by livery, it could not be determined before entry. 4 Kent's Com. p. *128. In Indiana a demand of possession, based on the breach, followed by a refusal, is equivalent to an entry on the premises. *Clark* v. *Holton,* 57 Ind. 564; *Indianapolis, etc., R. Co.* v. *Hood,* 66 Ind. 580; *Cory* v. *Cory,* 86 Ind. 567; *Preston* v. *Bosworth,* 153 Ind. 458, 55 N. E. 224, 74 Am. St. Rep. 313. Without determining whether this rule as to an entry should be applied to the grant of an easement or of a chattel interest (*Roberts* v. *Davey,* 1 Nev. & Man. 443), or whether it is enough for the grantor in such case to evince unequivocally his election, we think that it may be affirmed in this case that the forfeiture is sufficiently shown. Here the grant did not dispossess the appellants, and they could not enter upon themselves; and, besides, the failure for so long a time, without apparent excuse, to develop the property, *prima facie* authorized appellants, without demand, to treat the grant as abandoned. See *Richter* v. *Richter,* 111 Ind. 456, 12 N. E. 698; *Cree* v. *Sherfy,* 138 Ind. 354, 37 N. E. 787; *Island Coal Co.* v. *Combs,* 152 Ind. 379, 53 N. E. 452; *Huggins* v. *Daley,* 40 C. C. A. 12, 99 Fed. 608, 48 L. R. A. 320; *Guffy* v. *Hukill,* 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901. As to election by suit, see *Carnahan* v. *Tousey,* 93 Ind. 561.

The facts stated in the second paragraph of complaint, which stand as admitted by the demurrer, were such as to require the court below to aid appellant, by means of its jurisdiction, to decree cancellation and to remove clouds from titles.

The judgment is reversed, with an instruction to the court below to overrule the demurrer to the second paragraph of complaint.

WALTON ET AL v. WILD GOOSE MINING & TRADING CO.

(123 Federal 209. Circuit Court of Appeals, Ninth Circuit. May 25, 1903.)

The rules of the circuit court of appeals requiring specific assignments of error and reference to the page of the transcript containing the alleged error, must of necessity be strictly complied with.

A denial of new matter in the replication to the answer may be on information and belief under the Alaska Code.

A motion for nonsuit is waived by the introduction of evidence after it has been overruled, and the ruling thereon cannot be assigned as error in the appellate court.

[1]**The right to maintain ejectment depends on the possession** of the property at the time suit was brought, and the fact that plaintiff was in possession before or since is not material.

The introduction of the location certificate as evidence before proof of the location itself is permissible in the discretion of the court.

[2]**Notices of location of mining claims are to be liberally construed,** and are not invalid because of mistakes therein as to courses and distances.

[3]**Expert questions too remote.** The opinions of miners as to the quantity of earth or gravel which a miner could move in a day were properly excluded, where they were not confined to ground of any particular character or condition or to any stated season, and the witnesses were not shown to be familiar with the ground in question in the action.

Full set of instructions as to what constitutes a placer location and the doing of the assessment work on a placer claim, considered and approved.

Separation of jurors. In the absence of injury, a mere separation of the jury in civil cases, without the consent of the court, is not *per se* sufficient ground for a new trial.

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[1]Possession under defective location is good against a mere intruder. *Meydenbauer* v. *Stevens*, 18 M. R. 579.

Possessory right on the public domain, how proved. *Ritter* v. *Lynch*, 123 Fed. 930.

[2]*Book* v. *Justice Co.* 17 M. R. 617.

[3]As to expert testimony in mining cases see *Douthett* v. *Fort Pitt Co.* 22 M. R. 204 and notes.

Consideration of the class of expert testimony required in proving mechanical defects. *Caven* v. *Bodwell Co.* 97 Me. 381; 54 Atl. 851.

The statutory provision requiring instructions to be written without oral explanation is not infringed by the court orally answering a question asked by the jury after they had retired where no possible injury could have resulted to the complaining party.

That the bailiff in charge of the jury was properly instructed will be presumed in the absence of either record of the fact or objection for want of the fact.

Statements made by jurors not under oath, after the trial is over, are not competent evidence to show misconduct; and to warrant the granting of a new trial on that ground, the evidence of misconduct must be clear, certain, and convincing.

In error to the District Court of the United States for the Second Division of the District of Alaska.

BRUNER & BROS., ELWOOD BRUNER, A. J. BRUNER, and GEORGE D. SCHOFIELD, for plaintiffs in error.

PAGE, MCCUTCHEN & KNIGHT, and GORDON HALL (E. J. MCCUTCHEN, SAMUEL KNIGHT, and A. J. DALEY, of counsel), for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is an action in ejectment brought by the plaintiff in the court below, defendant in error here, to recover the possession of a certain placer mining claim (designated as claim No. 19), and consisting of 20 acres of land situated on Ophir creek, in Council City Recording District in Alaska. The case was tried before a jury, which found a verdict in favor of the defendant in error for the property described in the complaint, without any damages for the use and detention thereof. Judgment was rendered upon the verdict, from which judgment the plaintiffs in error have sued out a writ of error. They base their claim to the land upon a relocation of the ground, and the real merits of

the case involve but one question, viz., whether the original locator, through whom the defendant in error deraigns its title, performed the annual assessment work upon the mining claim in controversy during the year 1899. Upon this point there is much conflict in the evidence. Lena Walton, on behalf of the plaintiffs in error, testified that early in December, 1899, she went upon the ground "and made a careful examination of the claim for the purpose of ascertaining whether or not any assessment work had been done. I found Walker's initial stake, but there were no corner stakes whatever upon the claim. On or about the 10th or 12th of December, 1899, I went with * * * Wilson upon the claim and examined the property. There was no work of any kind done upon the claim at that time. * * * On the morning of January 1, 1900, at the hour of 1 a. m., Mr. Wilson and I located the claim," and that there was but one stake on the ground at that time, and that was at the initial point of location. Several of the witnesses testified substantially to the same effect. On behalf of the defendant in error, evidence was introduced as to the existence of stakes at the four corners as well as at the initial point, and that in July, 1899, there was a cut from 30 to 50 feet long, 3 feet wide, and 3 feet deep; another cut 10 to 12 feet long, and about 5 deep; and other small prospect holes at other places, the work in value being variously estimated by the witnesses at from $100 to $200.

The record in this case comes before the court in a very unsatisfactory manner, and many of the alleged errors are not assigned in the manner required by the rules of this court. Exceptions were indiscriminately taken in the court below upon nearly every ruling made or action taken by the court, and in many instances no specific objection was made. The record shows that 71 exceptions were taken, and it contains 42 assignments of error, and the specifications of error in the brief are reduced to 26.

1. The circuit courts of appeals have repeatedly called the attention of counsel to the absolute necessity of adhering strictly to the terms or rule 11 (90 Fed. cxlvi, 31 C. C. A. cxlvi), concerning "Assignments of Errors," and to subdivision 2 (a, b, c) of rule 24 (90 Fed. clxiv, 31 C. C. A. clxiv), in relation to "Briefs." As was said by this court in *Migeon* v. *Montana C. R. Co.* 77 Fed. 249, 252, 23 C. C. A. 156, 159:

> "A strict compliance with these provisions would not only be of great advantage to counsel in their arguments, but would materially aid the court, and lessen its labors. It is the duty of an appellant to particularly point out the alleged error upon which he relies, and to directly refer the court to the page of the transcript where the alleged erroneous ruling of the court is to be found."

The object of the rules is to so present the matter raised by the assignment of error that this court may understand what the question is it is called upon to decide without going beyond the assignment itself, and also that the party excepting may be confined to the objection taken at the time, which must then have been stated specifically. The party complaining of the action of the lower court must lay his finger upon the point of objection, and must stand or fall upon the case he made in the court below. Appellate courts are not the proper forum to discuss new points. The are simply courts of review to determine whether the rulings of the court below, as presented, were correct or not. *Van Gunden* v. *Virginia Co.* 52 Fed. 838, 840, 3 C. C. A. 294; *City of Lincoln* v. *Street-Light Co.* 59 Fed. 756, 8 C. C. A. 253; *Lincoln Savings Bank & Savings Deposit Co.* v. *Allen,* 82 Fed. 148, 27 C. C. A. 87; *City of Anniston* v. *Safe Deposit & Trust Co.* 85 Fed. 356, 29 C. C. A. 457.

2. The first assignment of error is as follows:

> "That the said court erred in overruling and denying the motion made by counsel for plaintiffs in error, at the commencement of the

proceedings, for judgment on the pleadings upon the following grounds, to wit: (1) Plaintiff's second amended complaint alleges a location made May 25, 1898, and it does not affirmatively allege the performance of the annual labor required by law during the succeeding year of 1899, or at any time prior to the location of Walton and Wilson, under which answering defendants claim title; (2) that it affirmatively appears from the answers of defendants Walton and French that they claim under an alleged location dated January 1, 1900, and that it affirmatively appears in the answers of said defendants that plaintiff and its grantors failed and neglected to perform the annual assessment work on said claim for the year 1899, or prior to the Wilson and Walton location. The plaintiffs deny this last allegation on information and belief, and we contend that it is not a sufficient denial, and defendants are entitled to judgment on the pleadings."

The reply to the second amended answer is as follows:

"(1) Plaintiff has no knowledge or information sufficient to form a belief as to the new matters and things in said second amended answer set out and contained, and therefore denies each and every new allegation and the whole thereof, except as hereinafter stated."

In the argument of counsel for plaintiffs in error our attention is called to the fact, outside of the assignment of error, that the answer to which the above is the reply alleged that the ground in dispute "was on the 1st day of January, 1900, public, unoccupied, and unappropriated mineral land of the United States," and that no reply was made to this averment. This was not such "new matter" as required a reply by section 67 of the Alaska Code, 31 Stat. 343, c. 786, but was a denial of title in the defendant in error. The contention as to the denial in regard to the performance of the annual labor on the claim for the year 1899, "upon information and belief," is that the defendant in error must have known whether such labor was performed or not, and that its denial, upon information and belief, was evasive, and equivalent to no denial at all. The argument upon this point might have had some force if the defendant in error had been

the locator of the claim, but the record shows that it did not locate the claim, and did not become interested therein until September 20, 1901, when it purchased the ground, and may not, in fact, have known at the time of filing its reply what the facts were in regard to the assessment work for the year 1899. It cannot, therefore, be said that the reply was not made in good faith or that it was not sufficient. It was the duty of the plaintiffs in error, if they deemed the reply insufficient, to have, within the proper time, demurred thereto, or moved the court to strike it out, as authorized by section 70 of the Alaska Code. By failing to do so, they virtually admitted that the reply was sufficient, and the case came on for trial upon the issues thus raised. The motion thereafter made for judgment upon the pleadings was, in any event, properly overruled, because such motion could only be considered when there was no demurrer or reply to the new matter constituting the defense. Section 69 of the Code so expressly provides:

"If the answer contain a statement of new matter, constituting a defense or counterclaim, and the plaintiff fail to reply or demur thereto within the time prescribed by law or rule of the court, the defendant may move the court for such judgment as he is entitled to on the pleadings."

3. It is claimed by the plaintiffs in error that the defendant in error is not entitled to maintain this action because they were in possession of the property "at some time." The assignments of error in this respect are: (3) The court erred in overruling and denying defendants' motion for a nonsuit on the ground "that the plaintiff has failed to prove a cause sufficient to be submitted to the jury. That this is an action to recover the possession of real property, and they have shown affirmatively by their testimony that they were in possession of the property for a long time prior to the commencement of the action and subsequent thereto." (17)

That the court erred in refusing to give the following instruction during the course of the charge to the jury:

"The jury are instructed that this is an action to recover the possession of real property, and if you find from the evidence that the plaintiff entered into possession of the premises described in the complaint in the summer of 1901, and remained in possession of the premises by their officers or employees until subsequent to the time of the commencement of this action, then and in that event there could have been no ouster of the plaintiff as alleged in its complaint, and you must find for the defendants."

The point involved is also incidentally referred to in other assignments.

With reference to the possession of the property, the testimony of the witnesses is to the effect that Walker, the original locator of the claim, went upon the ground in May, 1898, and that at various times during the year 1899 his authorized agents occupied the ground. That just prior to January 1, 1900, in midwinter, after the mining season of 1899 had closed, Lena Walton, one of the plaintiffs in error, in company with one Wilson, from whom French, the other plaintiff in error, derived his interest in the claim, went upon the ground and relocated claim 19. The record is silent as to the possession of the claim during the year 1900. It affirmatively appears that both parties were in possession of some portion of the claim in 1901. On or about November 13, 1901, the defendant in error withdrew its men from the ground in controversy. The second amended complaint was filed March 22, 1902, and it is therein alleged that about September 20, 1901, the defendants, plaintiffs in error, "wrongfully and unlawfully entered upon and took possession of said mining claim, and ousted and ejected the plaintiff therefrom, and withheld the possession thereof, and ever since said date have, and now do, so withhold the possession of said claim from the plaintiff, to the plaintiff's loss, injury, and damage." In their answer to this averment, the plaintiffs

in error "admit that on the said 20th day of September, A. D. 1901, the said defendants French and Walton did, ever since have, and do now withhold the possession of a portion of the premises described in plaintiff's complaint from plaintiff." If the defendant in error was entitled to the property, and the plaintiffs in error were unlawfully withholding the same when the action was first brought, the date of which is not shown in the record, then the defendant in error, upon making proper proofs of its title, would be entitled to recover, and the date of the alleged ouster would be immaterial. The record further shows that the plaintiffs in error in their respective answers allege, among other things, that they were placed in possession of said property by an order of court made March 3, 1902, "and that ever since" said date they "have been and now are in the peaceable and exclusive possession of said mining claim, and the whole thereof." Upon the trial of the case, the plaintiffs in error offered to show that an agent of the defendant entered into the possession of the claim in the month of September, 1901, and maintained the possession "up to the 14th day of November, 1901, and after the commencement of the suit." And it is claimed that the court erred in denying this offer. When all these facts and circumstances are considered, we are of opinion that no alleged error in the several assignments under consideration, prejudicial to the rights of the plaintiffs in error, affirmatively appears. The motion for a nonsuit on the ground above stated was properly overruled. The motion for a nonsuit on the ground stated might be disposed of on the ground that, as presented, it is not subject to review in this court, because the plaintiffs in error did not rest their case upon the ruling of the court, but immediately proceeded to introduce evidence in their own behalf, and thereby waived their motion for a nonsuit. In *Runkle v. Burnham,* 153 U. S. 216, 222, 14 Sup. Ct. 837, 840, 38 L. Ed. 694, the court said: "By not resting on his motion for a nonsuit, and by there-

after offering his own evidence, the defendant waived his motion, and the overruling thereof cannot be assigned for error here." *Union Pacific Railway* v. *Daniels,* 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597, and authorities there cited. See, also, *Sigafus* v. *Porter,* 84 Fed. 430, 28 C. C. A. 443; *Power* v. *Stocking,* 26 Mon. 478, 482, 68 Pac. 857. The court did not err in refusing to give the instruction set forth in the sixteenth and seventeenth assignments of error, because the question of possession must relate solely to the time of the commencement of the action, and not to "any time prior" thereto or "at any time subsequent." The court did not err in refusing to allow the plaintiffs in error to introduce evidence contrary to the affirmative allegations of their answer.

4. It is claimed that the court erred in permitting plaintiff, defendant in error, to introduce in evidence the location certificate, which is set out in full in the second assignment of error. In the brief of the plaintiffs in error, numerous reasons are assigned to establish the error complained of: (1) That the description in the certificate did not conform to any allegation contained in the second amended complaint, in this: that the complaint described a claim running southeasterly from the initial point, and the location notice describes a claim running northerly from the same point. (a) That no foundation had been laid for the introduction of said certificate; (b) that the description therein given had not been identified with the description of the premises described in the amended complaint; (c) that it had not been shown to be an original record or a certified copy of such record; (d) or that it had ever been recorded; (e) that it had not been shown that a valid location had been made, (f) or that the boundaries of the claim had been marked. The order of introducing the testimony in every case is largely within the discretion of the court, and the exceptions taken, that other matters had not been established at the time the notice was

introduced, are without any merit. The introduction of the location notice was at best but a preliminary step in the order of proofs necessary to establish the rights of the defendant in error to the mining claim in controversy. The location notice is sufficiently identified with the description in the complaint. Both refer to claim 19. If there was any clerical error as to the courses or distances, the rule is that such discrepancies are to be controlled by the monuments erected upon the ground, or references to other well-known objects or locations. The objections of counsel as to the difference in the descriptions of the claims in the complaint and notice are hypercritical in their character. The description of the mining claim in the amended complaint is as follows:

"Placer mining claim, known as and called 'Number Nineteen (19) Above Discovery on Ophir Creek,' formerly known as Kivak creek, a tributary of the Neuklux river, in the El Dorado mining district, in the district of Alaska, more particularly described as follows, to wit: Commencing at the original location stake of E. S. Walker, situated about the center of the upper end line of No. 18 Above Discovery on Ophir creek; thence north, 53 degrees and 28 minutes east, 356.8 feet, to a stake; thence south, 60 degrees and 16 minutes east, 1,426.5 feet, to a stake, situated about 158.5 feet in a southerly direction from the original northwest corner stake of the claim marked on the ground by the said E. S. Walker, and known as the 'Walker Location' or 'No. 19 Ophir'; thence south, 42 degrees 25 minutes west, 690.8 feet, to a stake; thence north, 53 degrees and 30 minutes west, 1,505.6 feet, to a stake; thence north, 54 degrees and 1 minute east, 186.3 feet, to point of beginning—said claim containing less than twenty acres."

In the certificate of location it is described as follows:

"No. 19 Above Ophir. Notice is hereby given that the undersigned, having complied with the requirements of chapter six of title thirty-two of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1422], and the local customs, laws, and regulations, has located twenty (20) acres of placer mining ground situated in El Dorado mining district, Northwestern Alaska, and described as follows: Beginning at the upper or northerly end of claim No. 18;

thence running fifteen hundred feet in a northerly direction along Ophir (formerly the Kivak) creek; thence 300 feet on either side of the middle of the channel of said creek. Discovered May 25th, 1898. Located May 25th, 1898. Locator, E. J. Walker. Recorded June 23d, 1898. Recorder, H. P. Mordaunt. Charges, $5.00, paid."

Notices of location of mining claims in remote settlements and in new mining districts are seldom drawn with perfect accuracy. The courses and directions cannot readily be ascertained, because the wandering prospector does not always carry a pocket compass, nor is he often accompanied by a surveyor, who could with his instruments correctly give the metes and bounds. In *Book* v. *Justice Co.* 58 Fed. 106, 115, the court said:

"In construing notices of this character, where, under the mining rules and local regulations or state laws, such notices are required to be posted upon the ground, the courts are naturally inclined to be exceedingly liberal in their construction. Such notices are often drawn by practical miners, unaccustomed to legal forms and technical phraseology; hence the language used in the notices is often subject to more or less criticism by counsel learned in the law, and engaged in preparing documents in legal shape and form. Then, again, locations are often made without any accurate knowledge of the true course and directions which a compass would readily give, and mistakes in the notice as to the direction and course of the ground located often occur. But such mistakes do not invalidate the location. Positive exactness in such matters should never be required. It is the marking of the location by posts and monuments that determines the particular ground located."

5. There are several assignments of error to the effect that the court erred in refusing to permit certain named witnesses introduced by the plaintiffs in error to answer questions propounded to them as to how long it would take to dig holes or excavate cuts of given dimensions, what is considered by miners generally as a day's labor in the performance of general assessment work, and what number of cubic yards of earth can be removed per day. Conceding, for the purpose of this opinion, that the questions were material and rele-

vant to the issues in this case, it nevertheless would be necessary, before the opinion of the witnesses could be given, to show that the witnesses were competent, by their experience as practical miners, to give an opinion. It does not affirmatively appear that the witnesses, or either of them, were qualified to give an opinion. They were miners by occupation, and had worked as such for several years; but it does not appear that either of them had worked upon or examined claim 19 on Ophir creek, or knew whether the ground on that claim was of the same general character as in the places where they had worked, and the questions, as asked, were not confined to the seasons of the year when the work was done, whether the ground and gravel was soft or loose, hard or frozen. Some of the witnesses were allowed to give their opinion as to the number of cubic yards a miner could remove in a day. One said, "A man in the character of gravel —loose gravel—should make ten or twelve cubic yards per day." Another, a miner of extended experience in Montana and Alaska, testified, "A man can move six yards or six and a half yards of ordinary loose bar gravel per day, where eight men are being worked on a string, three of whom are handling the tailings." The qualification of any witness to express an opinion should always be made to appear to the satisfaction of the court. Opinion evidence, like expert testimony, is of but little, if any, value unless connected with a full statement of the facts within his own knowledge; it always depends more or less upon the facts stated by them which form the basis of their opinion.

6. We have carefully examined the alleged errors of the court in giving or refusing instructions, and find no prejudicial error therein. Considered as a whole, the instructions given contain a clear and fair statement of the facts and the law applicable to this case. The most important points urged by plaintiffs in error refer to the manner of locating placer mining claims, and the acts necessary to be performed in

order to constitute a valid mining location. It is further claimed that certain portions of the instructions are unsupported by the evidence; that the judge usurped the functions of the jury in failing to instruct the jury that it was the exclusive judge of the facts; that the court erroneously instructed the jury that Walker's location was properly marked on the ground; and erroneously instructed the jury in regard to the forfeiture of mining claims, etc. The court instructed the jury, among other things, as follows:

"(a) It is the duty of the court to determine all questions of law, and it is your province and duty to determine all questions of fact. * * * (b) The affirmative of the issue is upon the plaintiff to prove the original location, discovery of gold, and the marking of the boundaries of the claim in dispute by Walker, prior to the 1st day of January, 1900, and that the burden of proof in these matters is upon the plaintiff, who must establish each of them by a preponderance of the evidence. On the other hand, the affirmative of the issue is upon the defendants to establish that Walker did not do the necessary assessment work on the claim in 1899, or cause it to be done, and the burden of proof upon that question is upon the defendants. * * * (2) Plaintiff claims title to the premises in dispute as a placer mining claim. The right of possession of a placer mining claim in such cases must be based on a valid location thereof in conformity with the laws of the United States. * * * (4) Under the laws of the United States, the requisites of a valid location of placer mining claims are: First. The ground sought to be located must be vacant, unappropriated mineral land belonging to the government of the United States. Second. The location must be marked on the ground so that its boundaries can be readily traced. Third. Discovery of mineral in the ground. (5) A notice of location was not required by the laws of the United States to be either posted, filed, or recorded in the office of the mining recorder at the time of the location by Walker, or by Wilson and Walton. Such notice was then required to be posted, filed, and recorded only when the mining rules, regulations, and customs of the district provided for it. No evidence was introduced tending to prove the existence of any local rule, regulation, or custom adopted by the miners in the district where this mining claim was located requiring the posting, filing, and recording of notices of location at the time of the location of the mine in question; you are therefore instructed that the posting, filing, and recording of such notice was not necessary to the

validity of either of the locations in question. If any such notice was posted, filed, or recorded, however, that is a fact which you may consider in determining whether or not either of the parties did, as alleged, in fact make a location of the ground in question. (6) As to whether or not there has been a sufficient marking of the location on the ground so that the boundaries could be readily traced, is a question of fact for you to decide. Any marking of the ground claimed by stakes and monuments, and written notices whereby the boundaries of the claim located can be readily traced, is sufficient. (7) It is not necessary that the marking of the location on the ground be done by the locator in person; such marking may be done by the agents or employees of the locator as well as by the locator himself. * * * (8) Nor is it necessary that a discovery of gold be made by the locator in person; a discovery of gold made by any agent or employee of the locator, or by any person acting in his behalf and for his benefit, and if made before any intervening rights attach, will be just as valid as if made by the locator in person. * * * (9) It is not necessary that the acts requisite to perfect a mineral location be performed in any particular order; it is sufficient if they are all performed before any subsequent location is made. * * * (10) In the absence of evidence to the contrary—and there has been no evidence to the contrary produced on the trial of this case—the law will presume claim No. 18 on Ophir creek to be a well-known natural object and permanent monument. * * * (12) You are instructed that if you believe from the evidence that, prior to the time of the location by Lena Walton and J. H. Wilson of the mining claim described in plaintiff's second complaint, it was marked on the ground by stakes and monuments as claimed by the plaintiff, and set there by Captain Walker or by others at his request and for his benefit, then and in that event you are instructed that the visible stakes and monuments placed on the ground would control the location of the claim, if the same should be inconsistent with the measurements and description contained in the location notice, provided that you should find that the location of the claim is approximately the same in both. (13) The evidence in the case shows that the location originally marked by Walker or his agents on the ground was too large; that is, that it contained more than twenty acres. You are instructed that this did not invalidate the Walker location, but merely rendered it voidable as to the excess over and above twenty acres, which is what the law allows in placer claims. * * * (15) When a valid location of a mining claim is once made it vests in a locator and his successors in interest the right of possession thereto, which right cannot be divested by the obliteration or removal, without the fault of the locator or his successor in interest, of the stakes and monuments marking its boundaries, or the ob-

literation or removal from the claim of the location notice posted thereon. * * * (17) If, under the foreging instructions, you should find that prior to the location of Lena Walton on the first day of January, 1900, Captain E. S. Walker, the grantor of the plaintiff, through himself, his agents or employees, made a valid location of the mine described in plaintiff's second amended complaint, then it will be your duty to consider whether or not the annual labor was performed on said mine by plaintiff's grantor, Captain Walker, during the year 1899. * * * (21) The law does not prescribe the particular kind of labor which is to be performed, nor in what it shall consist, nor the manner in which it shall be performed. Nor does the law require that it shall benefit the claim in the sense of making the claim more valuable after the performance of the labor than before. And you are therefore instructed that any labor performed upon the claim, if sufficient in amount, will satisfy the law, if its tendency is to develop the claim as a mine. (22) You are instructed that the digging of prospect holes, or the digging of a cut or cuts, or drain ditch or ditches, the removal of brush, panning, etc., and all things done necessary for the doing of the assessment work, if sufficient in amount, will be compliance with the law. (23) Work done for the purpose of discovering mineral, whatever the particular form of the deposit, is also work and improvement within the meaning of the statute. * * * (24) You are instructed that the law requires one hundred dollars' worth of work. And in determining the amount of work done upon a claim for the purpose of representation, the test is as to the reasonable value of said work, not what was paid for it, or what the contract price was. But it depends entirely upon whether or not said work was reasonably worth the sum of one hundred dollars. * * * (25) In estimating the value of the labor performed, the jury should consider the distance of the mine from the nearest point where labor could be procured, the cost of maintaining men while the labor was being performed, the current rates of wages, and any other necessary and reasonable expense which would reasonably and necessarily be incurred in the performance of the said labor."

These instructions, of themselves, show that the objections urged thereto are not well taken. Nearly all of the legal principles announced therein with reference to the notice of location, the character of assessment work, the discovery of mineral, the marking of the boundaries, recording of the claims, destruction or removal of the stakes, are in line with the principles expressed in *Book* v. *Justice M. Co.* (C. C.

58 Fed. 106, 111-118, 124-128, which have time and again been approved by the courts. *Doe* v. *Waterloo M. Co.* 70 Fed. 455, 458, 17 C. C. A. 190; *Migeon* v. *Montana C. R. Co.* 77 Fed. 249, 255, 23 C. C. A. 156; *Garrard* v. *Silver Peak Mines* (C. C.) 82 Fed. 578, 585; *Perigo* v. *Erwin* (C. C.) 85 Fed. 904; *Erwin* v. *Perigo,* 93 Fed. 608, 611, 35 C. C. A. 482; *Smith* v. *Newell* (C. C.) 86 Fed. 56; *Nevada Sierra Oil Co.* v. *Home Oil Co.* (C. C.) 98 Fed. 673, 676; *Haws* v. *Victoria Copper M. Co.* 160 U. S. 303, 318, 16 Sup. Ct. 282, 40 L. Ed. 436; *McShane* v. *Kenkle,* 18 Mont. 208, 212, 44 Pac. 979, 33 L. R. A. 851, 56 Am. St. Rep. 579; *Strasburger* v. *Beecher,* 20 Mont. 143, 151, 49 Pac. 740; *Hayes* v. *Lavagnino,* 17 Utah, 185, 197, 53 Pac. 1029; *Wilson* v. *Triumph M. Co.* 19 Utah, 66, 76, 56 Pac. 300, 75 Am. St. Rep. 718. Upon these points further discussion is unnecessary. Upon the other points but little need be said. That the excess of 20 acres in the location referred to in instruction No. 13 did not invalidate the location, but merely rendered it voidable as to the excess, see *Rose* v. *Richmond,* 17 Nev. 25, 59, 60, 27 Pac. 1105; *Richmond* v. *Rose,* 114 U. S. 576, 579, 580, 5 Sup. Ct. 1055, 29 L. Ed. 273. The remark of the court in this instruction, that "the evidence in the case shows that the location originally marked by Walker or his agents on the ground," etc., did not invade the province, or usurp the functions, of the jury. The court did not assume as undisputed a question of fact; the jury could not have been misled thereby. The court stated in one place that the question whether the marking of the ground is sufficient or not is a quesion of fact for the jury, and in other instructions told the jury that the burden of proof to establish the marking of the boundaries by Walker prior to January 1, 1900, was upon the plaintiff (defendant in error), and that it must establish them by a preponderance of the evidence. The rule is universal that the entire charge must be taken together, and when the instructions in this case are

read in their entirety the criticism of counsel is found to be wholly untenable and unworthy of extended discussion.

7. The assignments of error 32, 33, and 34, that the court erred in giving instructions in relation to the question of forfeiture, are not well taken. One of these instructions was copied from the decision of the Supreme Court of the United States in *Hammer* v. *Garfield M. Co.* 130 U. S. 291, 301, where the court said: "A forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law." All the instructions given upon this point are fully sustained by the authorities. *Belk* v. *Meagher,* 104 U. S. 279; *Johnson* v. *Young,* 18 Colo. 625, 629, 34 Pac. 173; *Colman* v. *Clements,* 23 Cal. 245, 247; *Bishop* v. *Baisley,* 28 Or. 119, 125, 41 Pac. 936; *Oreamuno* v. *Uncle Sam M. Co.* 1 Nev. 215, 218; 2 Lindley on Mines, § 645, and authorities there cited.

8. The Code of Alaska, subsec. 6, § 187, provides:

"The court shall then charge the jury, and if either party require it, and shall at the commencement of the trial give notice of his intention so to do, the charge of the court, so far as it relates to the law and the facts of the case, shall be reduced to writing and given to the jury by the court as written, without any oral explanation." 31 Stat. 361, c. 786.

The court in the present case was at the beginning of the trial requested by both parties to instruct the jury in writing. It is earnestly contended by counsel for the plaintiffs in error that the court erred in instructing the jury orally after they had retired to consider their verdict. The record shows that the jury was brought into the courtroom upon their request to be instructed by the court "in regard to damages." There are over a dozen pages of the printed record filled out by affidavits as to what then occurred. But the sum and substance of the whole matter is that the jury asked

the court whether they would have to find damages in the event that they found for the plaintiff, and the court orally replied "No." The jury shortly thereafter came into court with a verdict in favor of the plaintiff, without assessing any damages. As the jury found no damages, it is difficult to see how the plaintiffs in error could have been injured by this so-called "oral instruction." But counsel says that the court violated a plain provision of the statute, and that his clients have the right to demand that the statute of Alaska with reference to the trial of causes should be strictly followed. Brewer, J., in *State* v. *Potter,* 15 Kan. 302, 320, in construing a similar statute upon this point, clearly stated the rule applicable to the facts of this case, as follows:

"It may be remarked that the purpose of this statute is to secure to the defendant the exact rulings of the court, in order that he may avail himself of any errors in the ruling; that it was not intended to cast any unnecessary burdens upon the court, or to hamper and restrict communications between the court and jury; that it should be so construed as fairly to secure that purpose, and not to be made a mere weapon of technical error."

And in the course of his opinion further said:

"The mere fact that an oral communication has passed from the court to the jury is not of itself proof that the statute has been disregarded, but the court may properly make oral statements to the jury in reference to the form of the verdict, the manner in which the trial has been conducted, the behavior of the jury or counsel or parties, or any other oral statement which is not fairly and strictly a direction or instruction upon some question or rule of law involved in or applicable to the trial, or a comment upon the evidence."

See, also, *Boggs* v. *U. S.* 10 Okl. 424, 431-438, 63 Pac. 969, 65 Pac. 927, and authorities there cited; 11 Ency. Pl. & Pr. 257, and authorities there cited.

9. There is another point, based upon a statutory provision, argued at considerable length, which, although not

properly assigned as error, and no exception appearing to have been taken thereto in the court below, ought perhaps to be noticed, as it, of itself, will serve to illustrate the necessity of the enforcement of the rule first noticed in this opinion, and furnish a good reason for refusing to notice many other points. Section 192 of the Alaska Code, 31 Stat. 361, c. 786, provides that after the charge of the court the jury, if they retire, must be kept under the charge of one or more officers, and that:

> **The officer shall, to the utmost of his ability, keep the jury thus together separate from other persons, without drink, except water, and without food, except ordered by the court. * * * Before any officer takes charge of a jury this section shall be read to him, and he shall be then sworn to conduct himself according to its provisions, to the utmost of his ability."**

There is nothing in the record to show that the bailiff was not properly instructed and sworn, or that the provisions of the statute were not read to him. The minutes of the court show that "the jury were instructed by the court in writing, and retired for deliberation at 8:45 p. m. in charge of Bailiffs Lawrence and Armand, previously sworn for that purpose." The record does not show that any objection was made at any time, or that as a matter of fact the statute was not read to them. The plaintiffs having been silent at that time, they ought not now to be allowed to open their mouths on this subject after losing their case in the court below. They waived whatever rights they may have had by not promptly taking their objections at the proper time. 12 Ency. Pl. & Pr. 541, and authorities there cited. Moreover, the law presumes that every officer does his duty, and, in the absence of any showing to the contrary, the law would presume that the statute was read to him when he was sworn, in strict accordance with the provisions of the law.

10. The forty-first assignment of error is that the court

erred in denying defendant's motion for a new trial. This alleged error was orally argued at great length. The point sought to be made was the misconduct of the jury after they had retired to deliberate upon their verdict. It was claimed by the plaintiffs in error that the jury were confined in the Golden Gate Hall adjoining a room where there had been a banquet the night before, and that some of them removed hinges from the door leading into this banquet room and brought therefrom "eggnog or punch, and drank it in the jury room," and that some of them were "more or less under the influence of liquor;" that one of the jurors was taken downtown by one of the bailiffs "to get some tobacco," and disguised his face at the request of the bailiff, so that he might not be recognized on the street; that another juror, accompanied by a bailiff, went to his own house, and stayed away from the jury room about 15 minutes; that other jurors went out from the jury room to a closet, etc., etc. Numerous affidavits setting forth these transactions were presented to the court. An examination of them shows that all the statements therein contained are pure hearsay, consisting of conversations had by the affiants with some of the jurors, or declarations made by jurors in their presence. There is no pretense that the prevailing party in the action knew of or had anything whatever to do with the alleged misconduct of the jurors, or that the jurors, or either of them, were approached or improperly influenced by any person. There are no facts in regard to this assignment that would authorize this court to interfere with the order of the court below denying a new trial. Statements made by jurors not under oath, after the trial is over, are not competent evidence. *Cain* v. *Wallace,* 46 Kan. 138, 144, 26 Pac. 445; *Peterson* v. *Skjelver,* 43 Neb. 663, 671, 62 N. W. 43; *Phillips* v. *Town of Scales Mound,* 195 Ill. 353, 363, 63 N. E. 180. A new trial on the ground of the misconduct of jurors should not be granted unless the evi-

dence of misconduct is clear, certain, and convincing. *Omaha Fair Ass'n* v. *R. Co.,* 42 Neb. 105, 108, 60 N. W. 330. In the absence of injury, a mere separation of the jury in civil cases, without the consent of the court, is not *per se* sufficient ground for a new trial. 12 Ency. Pl. & Pr. 575, and authorities there cited; 2 Gra. & Wat. on New Trials, 502.

11. There are numerous other assignments of error and objections taken that fall within the rule first stated in this opinion or that are purely technical, wholly immaterial, or of a trifling nature. It is enough to say that we have examined all the points raised, whether noticed or not, and find them to be without any merit whatever. Upon the whole record, our conclusion is that no prejudicial error has been affirmatively shown. It must not be mere abstract error, but it must be prejudicial and injurious in order to avail the plaintiffs in error, for otherwise they have no cause of complaint. *Contreras* v. *Merck,* 131 Cal. 211, 214, 63 Pac. 336; *Boggs* v. *U. S.,* 10 Okl. 424, 63 Pac. 969, 65 Pac. 927.

The judgment of the district court is affirmed with costs.

FRANK W. GRIFFIN v. THE AMERICAN GOLD MINING CO.

(123 Federal 283. Circuit Court of Appeals, Ninth Circuit. May 25, 1903.)

[1]**Contract between owners of overlapping claims. Estoppel.** Plaintiff, the vendor, owned a lode claim which was overlapped by a prior placer claim belonging to defendant. Defendant agreed to buy the lode claim and to pay for it when patented. Afterwards by land office contest it forced the cancellation of the lode entry to the extent of the conflict. Defendant then refused to perfect its purchase: *Held*, That the subject matter of the contract was the lode claim less the conflict. But if otherwise the vendor could not plead vendor's inability to perform, when such inability was produced by its own act. Former opinion, 114 Fed. 887, overruled.

In error to the District Court of the United States for the First Division of the District of Alaska.

[1]*Drake* v. *Gilpin County Co.* 17 M. R. 396.

Defense of previous conveyance of part of claim, in suit for purchase money. *McIntyre* v. *Buel*, 132 N. Y. 192; 30 N. E. 396.

Where the vendor held title subject to a reservation of a mineral right but executed warranty deed as of the whole estate the deed may be rescinded at suit of the buyer. *Adams* v. *Reed*, 11 Utah 480; 40 Pac. 720.

Where notes are given for part of the price and before the notes become due the vendor puts a trust deed on the property the purchaser may rescind. *Ft. Payne Co.* v. *Webster*, 163 Mass, 134; 39 N. E. 786.

When the mine is to be paid for out of the proceeds, the buyer becomes personally liable if he sells it. *Carter* v. *Rhodes*, 135 Cal. 46; 21 M. R. 695.

A sub-lessee agreeing to pay a bonus out of the proceeds, is not bound to work after fair test shows only prospect of continuous loss. Such contract is assignable and the assignment does not make the lessee personally liable. *Caley* v. *Portland*, 22 M. R. 595.

One who commits a substantial breach cannot sue for failure to perform. *Loudenback Co.* v. *Tennessee Co.* 121 Fed. 298.

The fact that vendee had not signed the written contract does not leave him clear of the contract, where he has paid part of the purchase money and gone into possession. *Butterfield* v. *Nogales Co.* (Ariz.) 80 Pac. 345.

On rehearing.

ALFRED SUTRO and JOHN G. HEID (R. F. LEWIS, of counsel), for plaintiff in error.

LORENZO S. B. SAWYER and J. H. COBB, for defendant in error.

Before GILBERT, Ross, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. Upon a rehearing of this cause, the court, after a careful consideration of the terms of the contract involved therein, and the circumstances which attended its execution, has reached the conclusion that its construction thereof on the former hearing (*Griffin* v. *American Gold Mining Co.* 114 Fed. 887, 52 C. C. A. 507) was erroneous. The contract was made between M. W. Murray, the grantor of the plaintiff in error, as the party of the first part, and the Silver Bow Basin Mining Company, the predecessor in interest of the defendant in error, as party of the second part. It provided as follows:

"That the said party of the first part, for and in consideration of the covenants hereinafter set forth, to be performed by the party of the second part, and also in consideration of the sum of twenty-five thousand dollars to be paid to him by the party of the second part, as hereinafter set forth, hereby covenants and agrees with the said party of the second part to sell unto it that certain mining lode claim known as the 'Morris G,' situated in the Harris mining district, in the district of Alaska, for a full description of which reference is hereby made to the deed of the party of the first part to the party of the second part, of even date herewith, conveying said premises, and also the field notes of the United States deputy surveyor as set forth in the application of the party of the first part for a United States patent to said location known as the 'Morris G,' which application bears date the 13th day of August, 1891; and the said party of the first part further covenants and agrees to prosecute said application for a patent in the land office to a final destination, and upon the issuance of a receiver's receipt for said ground on said

application for a patent, and upon the payment of the sum of twenty-five thousand dollars as hereinafter set forth, the party of the first part hereby covenants and agrees that the deed heretofore mentioned and set forth, which by agreement of the parties is placed in escrow in the hands of A. K. Delaney, shall be forwarded together with such receiver's receipt to the commissioner of the general land office at Washington, with any necessary instructions of the party of the first part, to the end that the patent for said 'Morris G' lode may be issued to the party of the second part.

"For and in consideration of the covenants hereinbefore set forth, to be performed by the party of the first part, the party of the second part hereby agrees to purchase of the party of the first part the mining lode claim known as the 'Morris G,' and pay for the same the sum of twenty-five thousand dollars, as follows, to wit: Five thousand dollars on the 1st day of June, 1892, and twenty thousand dollars on the first day of August, 1892, provided that on the 1st day of June, 1892, the said party of the first part shall have successfully prosecuted in the land office his application for a patent for said premises, and shall have come into possession under and by virtue of such proceedings in the land office of a receiver's receipt, equivalent to a patent for said claim, but in case the party of the first part shall not have received said receiver's receipt for the first of June, 1892, then the whole sum of twenty-five thousand dollars shall be payable on the first day of August, 1892, provided as before that the party of the first part shall have successfully prosecuted his application for a patent for said premises and obtained said receiver's receipt. And it is further agreed that in case the proceedings upon said application for a patent shall not have been perfected and the said receiver's receipt issued by the 1st day of August, 1892, the party of the second part hereby agrees at any time within one year from said date to pay the said party of the first part the sum of twenty-five thousand dollars, the full consideration price of the said premises, whenever within that time the said party of the first part shall deliver to the party of the second part such receiver's receipt, together with the deed above mentioned and the said necessary instructions to the general land office, whereby the patent to the said premises may be issued by the general land office to the party of the second part."

The defendant in error, when it became the successor in interest of the Silver Bow Basin Mining Company, assumed all its obligations under the contract.

It will be seen that by this contract the purchase money for the mining claim was to become due in installments, of which

$5,000 was to be paid on June 1, 1892, and $20,000 on the 1st day of the following August, provided that by June 1st a receiver's receipt should have been issued for said mining claim to the party of the first part, but with the further stipulation that if the receiver's receipt were obtained at any time within one year from August 1, 1892, then the whole sum was to be due and payable upon the delivery of the receiver's receipt, together with a deed. This is the substance of the contract, and it is not altered or varied by the recital in the contract that a receiver's receipt is equivalent to a patent, nor by the further provision that the party of the first part shall deliver with the deed the necessary instructions to the general land office to secure a patent. There is no covenant that the party of the first part shall obtain a patent to the whole claim, nor is it stipulated that the payment of the purchase money shall be conditioned upon his right to such a patent, or the final issuance thereof. This contract was made on August 21, 1891. The admitted facts are that on June 4, 1881, Murry had located the Morris G. lode-mining claim; that on August 13, 1891, he filed his application for a patent; that on May 12, 1892, he received a receiver's receipt therefor, and for the whole of the claim as it is described in the contract; that on June 1, 1892, he tendered to the defendant in error the receiver's receipt, and demanded payment of the sum of $5,000, according to the contract. Murry had then complied in all respects with the provisions of the agreement. He had within the time limited in the contract obtained the receiver's receipt, and he became entitled to receive the first payment of the purchase money. It cannot be disputed that on that date a right of action matured in his favor for the recovery of the installment of the money so agreed to be paid him. On August 1st of that year he still had the receiver's receipt, and there was due him under the contract the remainder of the purchase money. He could then have brought an action for the recovery of the whole thereof. No defense

could have been made to his right of action. The defense which was subsequently made, and which the trial court held sufficient to justify an instruction to the jury to return a verdict for the defendant in error, was the fact that the defendant in error some years later had successfully prosecuted a contest against Murry's application for a patent to the lode claim, and had set up against the issuance thereof the fact that it owned a conflicting placer claim which had been located on October 4, 1880, and which was therefore prior in time to the location of the lode claim, and for which it had received a patent. This protest was filed on December 16, 1891. It asserted an adverse claim to 6.33 acres of the ground which was included in the Morris G. lode claim. Upon the issues presented by this protest, the general land office held the patent to the Morris G. lode claim for cancelation, as to the portion thereof in conflict with the placer claim. It was shown on behalf of the plaintiff in error that the Morris G. lode claim was surveyed by private survey in 1885 and 1886, and that in 1888 an official survey was made, and that in both surveys the corners were placed at the same points, and were well established and marked, and visible on the ground. In view of these considerations, we hold that Murry fully complied with the terms of the contract, and thereby became entitled to recover the stipulated purchase money. But if, indeed, there were a breach of the contract on his part, by his failure to obtain a receiver's receipt, which was in fact equivalent to a patent to the whole claim, it is clear that he was not in default in that respect, for the performance was prevented by the willful act of the other party to the agreement. The conduct of one party to a contract, which prevents the other from performing his part, is an excuse for nonperformance. *United States* v. *Peck,* 102 U. S. 64, 26 L. Ed. 46; *Marshall* v. *Craig,* 1 Bibb, 379, 4 Am. Dec. 647; *Williams* v. *United States Bank,* 2 Pet. 96, 7 L. Ed. 360; *Hotham* v. *East India Co.* 1 Durnf. & East. 638.

A further observation concerning this contract, which seems to us unanswerable, is that in the light of the surrounding circumstances, which may properly be adverted to, the real subject of the contract—that which the one party agreed to sell, and the other party agreed to buy—was the Morris G. lode-mining claim, less that portion thereof which was covered by the prior placer claim. At the time of making the contract the Silver Bow Basin Mining Company, the grantor of the defendant in error, not only well knew the boundaries of its placer claim, and knew that it owned the same, and that the location of that claim was prior in point of time to the location of the Morris G. lode claim, but it knew, also, that at the very time of making the contract its application had been made for a patent to the placer claim, and notice had been published thereof, and the time for objecting to or contesting the same had long since expired, and that the application and proceedings thereon were then about to culminate in the issuance of a patent, which in fact was issued in less than 30 days from that time. It is fairly to be inferred from these facts, and from the terms of the contract, that the predecessor of the defendant in error was well aware of its superior right and title to the placer claim, and knew that that claim overlapped nearly one-half of the Morris G. lode claim, and that nevertheless it was willing to and did contract and obligate itself to pay for the Morris G. lode claim, as it stood, subject to such overlap, the sum of $25,000, provided that the owner of the latter claim should within the stipulated time obtain a receiver's receipt therefor. In other words, the subject of the contract was the Morris G. lode claim, overlapped as it was by the prior placer claim; and the purpose of describing the lode claim by metes and bounds and reciting its acreage was to identify it, and not to indicate that it was of the essence of the contract that Murry should obtain a patent to the whole area therein described. In substance, the mining company said to Murry. "We have title to

6 1-3 acres of your lode-mining claim, and possess, therefore, if we were disposed to avail ourselves of it, the sure means of defeating to that extent your application for patent. Nevertheless, if you will proceed and obtain a receiver's receipt for your claim as it stands, we will pay you for it $25,000." If the mining company had refrained from interfering, and had permitted Murry to proceed as the contract contemplated, there can be no doubt that he would have obtained a patent for the whole of his claim. Instead of permitting him to do this, it interfered, opposed the issuance of patent for the whole claim, and obtained for itself a patent for nearly one-half the surface thereof. How can the defendant in error, therefore, contend that it has been injured? What has it lost by the breach, if breach there were of the strict letter of the contract? It already owned a portion of the ground covered by the Morris G. lode claim, and it was tendered a deed by Murry, upon the acceptance of which it would have obtained and possessed in fee simple the whole thereof. It has, or could have, obtained title to all that the contract called for, and we know of no legal ground upon which it can be absolved from paying the full sum which it agreed to pay therefor.

The judgment of the district court is reversed, and the cause is remanded for further proceedings not inconsistent with the foregoing opinion.

GEORGE GEMMELL v. JOHN SWAIN ET AL.

(28 Montana 331; 72 Pac. 662. Supreme Court. June 3, 1903.)

[1]**Location without discovery.** A location of a mining claim made without discovery is not entitled to the legal protection of an injunction except to the extent of the *pedis possessio;* that is, the claimant's actual workings.

[2]**A notice of location without discovery** is a nullity.

Competing prospectors cannot make use of the writ of injunction to secure priority of discovery or location on, or apparent superiority of right to a mining claim.

Appeal from District Court, Silver Bow County; WM. CLANCY, Judge.

Suit by George Gemmell against John Swain and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This action was commenced in the district court by the appellant, who was plaintiff below, to secure an injunction restraining the defendants from entering upon, sinking shafts, running tunnels, discovering or attempting to discover veins of mineral in, certain designated lands. The complaint alleges that on December 19, 1899, a portion of section 17, township 3 N., range 7 W., to the extent of 20 acres, was vacant, uninclosed, and unimproved mineral lands of the United States; that on that date the plaintiff, having reason

[1] *La Grande Co.* v. *Shaw*, 44 Oreg. 416; 72 Pac. 795.

Status of title when land is occupied by prospector drilling, with location before discovery. *Cosmos Co.* v. *Gray Eagle Co.* 21 M. R. 633.

Where lessee of a placer claim is sinking a well his rights will be protected against an attempt to claim the ground by locating him in. *Weed* v. *Snook*, 144 Cal. 439; 77 Pac. 1023.

[2] *Malecek* v. *Tinsley*, 73 Ark. 610; 85 S. W. 81. *Buck* v. *Jones*, 22 M. R. 467.

to believe and believing that veins or lodes of rock in place, bearing gold, silver, copper, and other precious metals, existed therein, entered upon the above-described land for the purpose of prospecting for and making discovery of such veins, and of locating the ground; that he proceeded to sink three shafts, but, before he made discovery of any such veins or lodes, he was enjoined by the district court, in an action entitled "*Harley et al.* v. *M. O. P. Co. et al.*," from further prosecuting his search; that he then posted at each of said shafts a written notice that he claimed the ground about each shaft to the extent of 750 feet east, 750 feet west, 300 feet north, and 300 feet south from the point where the notice was posted; that the plaintiffs in that action then immediately went upon the land, and commenced work for the purpose of making discovery of veins containing such precious metals, and of locating the ground. The plaintiff sought an injunction restraining the defendants from further proceeding with such work. An order to show cause and a temporary restraining order were issued, but, before a hearing was had upon the order to show cause, the defendants Harley, Butte & Boston Company, and Boston & Montana Company filed a demurrer to the complaint, which was by the court sustained; and, the plaintiff refusing to amend, the restraining order was dissolved, an injunction refused, and a judgment for costs entered against the plaintiff, from which this appeal is taken.

CLAYBERG & GUNN and GEO. M. BORQUIN, for appellant.

FORBIS & EVANS and T. BAILEY LEE, for respondents.

HOLLOWAY, J. (after stating the facts). The only question for determination is whether the complaint states facts sufficient to entitle the plaintiff to an injunction. The complaint, upon its face, shows that the land in dispute was vacant, uninclosed, and unimproved mineral land of the

United States; that the plaintiff went upon it, and was prospecting for veins of mineral-bearing rock, when he was enjoined. He had made no discovery, and consequently no location had been made, and none could be, for a location can rest only upon an actual discovery of such vein or lode. *Hauswirth* v. *Butcher,* 4 Mont. 299, 1 Pac. 714; section 2320, Rev. St. U. S. He was simply a prospector upon the public domain, with the bare, naked possession of the ground immediately about the three shafts where he was prosecuting his work. His possession was only such as is characterized in the law as *possessio pedis,* and could not be enlarged to include the entire 20-acre tract, or the whole amount of ground which he might have claimed under one or more quartz locations. Until discovery is made, no right of possession to any definite portion of the public mineral lands can even be initiated. Until that is done, the prospector's rights are confined to the ground in his actual possession, and until that possession is disturbed no right of action accrues, and even then no injunction would issue to restrain a mere trespass—certainly not in the absence of some showing of irreparable injury or the insolvency of the trespasser.

No contention is made that the work done by the defendants in prospecting this ground was done in or about any one of the shafts where plaintiff was prosecuting his work when enjoined, or that the work done by the defendants in any manner interfered with the work done by the plaintiff. The fact that plaintiff posted a notice at each of his shafts did not create any new right in him, or enlarge the right he already had. A notice of location (for such these notices purported to be) posted upon mineral land before discovery is made is an absolute nullity. *Upton* v. *Larkin,* 5 Mont. 600, 6 Pac. 66; section 2320, Rev. St. U. S. The mere fact that the plaintiff was enjoined from continuing his work, and that, too, wrongfully, as determined by this court (*Harley* v. *M. O. P. Co.* 71 Pac. 407), did not alter the rela-

tive rights of the parties, or entitle the appellant here to an injunction in this action. Competing prospectors cannot make use of the writ of injunction to secure priority of discovery or location on, or apparent superiority of right to, a mining claim.

We are of the opinion that the complaint does not state facts sufficient to entitle the appellant to an injunction, and that the district court committed no error in sustaining the demurrer. The judgment is affirmed.

Affirmed.

BRANTLY, C. J., and MILBURN, J., concur.

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ABANDONMENT.

1. *Void homestead entry.*—The owner of mining locations stopped work thereon temporarily, except annual assessment work on account of lack of transportation for ores, and another person entered the land as a homestead, but without the consent of the mine owner. *Held*, that in the absence of an affirmative showing of an intention to abandon, there was no abandonment. *Buffalo Zinc Co.* v. *Crump*, 276

2. *Reverts to the United States.*—Upon abandonment an unpatented claim becomes a part of the public domain. *McDermott M. Co.* v. *McDermott*, 338

3. *Abandonment under such circumstances* is equivalent to a quit-claim to the government and the party whose duty it was to do the work is estopped to claim the new title acquired by the relocation. *Id.*

4. *To constitute abandonment* by the lessee of a lease for oil there must be both an intention to abandon and actual relinquishment of the leased premises. *Lowther Oil Co.* v. *Miller-Sibley Oil Co.*, 656

See CONVEYANCE, 1; FORFEITURE, LEASE, 4; RELOCATION, 7.

ACCOUNT.

1. *What the lessee received for the gas is not its value*, on an accounting—all his mining expenditure has to come out of his sales. *Gerkins* v. *Kentucky Salt Co.*, 189

2. *Value, how proved.*—The value of the use of the well must be ascertained from the testimony of those acquainted with the facts, who may testify from their knowledge of the value of the use of such wells, where the lessee provides all the appliances necessary in caring for and transporting the gas. *Id.*

3. *Non-assessable interest. Monthly rests.*—Plaintiffs, owners of one-half interest in a lease, assigned two-eighths of the whole to defendants, owners of the other half, in consideration of the assignees' undertaking the whole expense of mining and treating the assignors' two-eighths as non-assessable. Accounts were to

ACCOUNT. *Continued.*

be rendered monthly. *Held*, construing the contract, that monthly rests are not favored in law and were not intended by the parties, and that the entire expenses of the lease were to be deducted to find the balance due. *Taylor* v. *Thomas*. 527

4. *Profits do not exist* until after expenses are paid. *Id.*

5. *Estoppel by receipt of shares.*—When monthly statements are rendered and the balances shown by such statements accepted and receipted for, the parties will not be heard to assert a different construction and excuse their failure to protest by fear that plaintiffs would cease to assume the risk of working. *Id.*

6. *Royalties not expenses.*—A contract to work and divide the profits refers only to the ore the lessees received as their share. The royalty was a primary charge on the output and the sole property of the lessor. *Id.*

See INSTROKE, 3; PARTNERSHIP, TENANTS IN COMMON, 6.

ADMISSIONS.

1. *The declaration of the locator* of a mining claim that he had conveyed the property by deed, and had been paid therefor, is an admission against his interest, and admissible after his death. *Scott* v. *Crouch*, 117

See RELOCATION, 6.

ADVERSE CLAIM.

1. *Amendment in adverse claim suit.*—An amendment in a suit supporting an adverse claim may be allowed although the statutory thirty days for filing complaint have elapsed. *Deeney* v. *Mineral Creek Co.*, 47

2. *An ordinary declaration in ejectment is sufficient*, under sections 2290, 2291, Comp. Laws, 1897, to present all the questions involved between an applicant for patent for a mining claim and an adverse claimant. *Id.*

3. *Entry void, made pending adverse.*—A receiver's receipt issued to a mining applicant during the pendency in the court of an action brought in support of an adverse claim, in pursuance of section 2326 of the Revised Statutes of the United States, is issued without jurisdiction and is void. *Id.*

4. *Liberal rule on evidence.*—On the trial of an action like the one at bar, all evidence tending to show the right of the plaintiff to the possession of the land in controversy is competent evidence, and should be admitted. *Morrison* v. *Regan*, 70

5. *Estoppel.—Adverse claim creates none against ejectment based*

ADVERSE CLAIM. *Continued.*

on prior title. An action of ejectment based upon a patent issued prior to the initiation by the defendant of a mining claim for which he has applied for a patent is not inconsistent with a claim adverse to that application, under section 2326 of the Revised Statutes, and such adverse claim does not estop the plaintiff from maintaining his action. *Larned* v. *Jenkins*, 94

6. *The failure to adverse within the sixty days* or to bring suit within the thirty days must be specially pleaded below; otherwise these defenses are waived. *Pennsylvania M. Co.* v. *Bales*, 436

7. *The file mark on the complaint* shows the date when suit is brought without the aid of an averment as to the time in the body of the complaint. *Id.*

8. *After the expiration of the period of publication* it is conclusively presumed that one who fails to file his adverse claim has no title. *Lavagnino* v. *Uhlig*, 610

9. *Right of possession.* Adverse claim proceedings are not intended to determine the rights of contestants to a patent but to determine their right to possession of the disputed ground. *Id.*

10. *Cannot rely on rights of third parties.* Where plaintiff, in an action to determine the right of possession to a disputed mining claim, fails to show in chief, any right to the claim, he becomes a stranger to the title, and cannot avail himself of any rights a third party may have had to the claim, where such third party has failed to file an adverse within the prescribed time. *Id.*

See ADVERSE POSSESSION 1; QUIET TITLE 1; TUNNEL, 3.

ADVERSE POSSESSION.

1. *Adverse possession during limitation period.*—Where a purchaser of mining claims has held them adversely for the period of limitation, it will be presumed, as against an adverse claimant, that the claims were regularly located. *Buffalo Zinc Co.* v. *Crump*, 276

2. *Adverse possession* of a mining claim cannot extend to a portion of a vein apexing outside the limits of the claim, and consequently no part thereof. *Davis* v. *Shepherd*, 575

See STATUTE OF LIMITATIONS.

AGENT.

1. *Agent using knowledge of value where his company declines to use it.*—Defendant while manager and a director of the defendant company, in sinking a shaft for the company, discovered a vein which he considered of sufficient value to induce him to pur-

AGENT. *Continued.*

chase a location which was supposed to cover such vein, outside the territory of the company. The policy of his company was to not acquire any further property and there was no conflict of title between the two properties: *Held*, that there was no unlawful use of knowledge officially acquired such as would raise any trust for the benefit of the company. *Calumet M. Co.* v. *Phillips*, 677

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AMENDMENT.

1. *Amendment to conform to proof.*—The trial court has discretionary power to permit the pleadings to be amended at the close of the evidence, to conform to the proof, and to deny a motion for a postponement of the trial therefor. And an amendment slightly changing the ground claimed, but presenting no new issues, does not entitle defendant to a continuance. *Montana O. P. Co.* v. *Boston Co.*, 471

See ADVERSE CLAIM, 1; RELOCATION, VERDICT, 2.

ANNUAL LABOR.

1. *Resumption after years of failure.*—Under Rev. St. U. S. § 2324, requiring a certain amount of labor to be done each year on a mining claim, under penalty of forfeiture, a claimant who has failed to perform the work for some year or years, but resumes work in good faith, is entitled to the property, as against a relocator after resumption. *Buffalo Zinc Co.* v. *Crump*, 276

2. *The burden of proving a forfeiture* by the failure of the former owner to perform the annual labor required by law rests upon him who sets it up. *Id.*

3. *Work credited to the valid claim.*—Work on a mining claim, done by one after making a valid location and a subsequent invalid one, will be attributed to the valid location. *Temiscal Co.* v. *Salcido*, 360

4. *Resumption after several idle years.*—Under Rev. St. U. S. § 2324, providing that, on failure to do a certain amount of work each year on a mining claim, the claim shall be open to relocation, provided the original locator has not resumed work on the claim after failure, and before such location, the locator, by doing work of the amount required in a certain year, after failure for some years to do work, will be treated as having resumed work. *Id.*

5. *Presumption that owners did the work.*—It is immaterial that all the co-owners did not do their share of the annual work. And if $100 worth was done on the claim, in the absence of proof

ANNUAL LABOR. *Continued.*

to the contrary, it will be presumed to have been done by the owners or some of them. *Yarwood* v. *Johnson*, 398

See PLEADING, 3.

APEX.

1. *Cannot follow lode on strike beyond side lines.*—One who discovers and locates a lode mining claim under the act of 1866 thereby renounces and abandons all rights and privileges to follow his lode on its course beyond the exterior lines of his patented claim, when he locates it upon the surface of the ground, enters it, and accepts a patent for it under the law. *Larned* v. *Jenkins*, 94

2. *Locator cannot follow vein beyond his boundaries on its strike.*—The act of July 26, 1866, does not grant to the patentee of a lode mining claim the right to follow on its strike his vein, with its dips, angles, and variations, beyond the boundaries of his location. It permits him to follow it beyond those boundaries on its dip or descending course only. *Id.*

3. *Locations on wide vein each enclosing only part of the width of the apex.*—Two adjoining claims were located at different times with a common side line which ran along the center of the apex of a very wide lode so that practically the north half of the apex of the vein was covered by one and the south half by the other: *Held*, that the prior location took so much surface as it covered and the whole vein on its dip between its end lines protracted and the later location took what surface it covered and the whole of the vein after it ceased to be enclosed within the protracted end lines of the prior location. *Empire State Co.* v. *Bunker Hill Co.*, 104

4. *Extralateral rights* of a lode mining claim apply only to what is beneath the surface, and never operate to enlarge surface rights which, under the statute, are limited to 300 feet in width on each side of the center of the ledge or lode. *Id.*

5. *No right to cross-cut through hostile claim to cut lode on dip.* The owner of a mining claim holding an apex within his lines and the right to work down from that apex has no right of way to drive a tunnel across the ground of another claim to reach his vein upon its dip. *St. Louis M. Co.* v. *Montana M. Co.*, 127

6. *Patent determines priority wherever a surface conflict.* Issuance of a patent, after due notice, for a mining claim, conclusively determines its priority, as to the surface and the incident extra-

APEX. *Continued.*

lateral rights, over claims whose surface lines conflict therewith. *Empire State Co.* v. *Bunker Hill Co.*, 132

7. *Burden on the extralateral claimant.*—In an action to restrain defendants, who are engaged in removing ores from beneath the surface of plaintiff's ground, the burden is on defendants to show that they are not trespassers, and that they have a right to follow the vein into plaintiff's territory; and in case of doubt an injunction should be granted. *Anaconda M. Co.* v. *Heinze*, 346

8. *Evidence of apex on rebuttal.*—Where, in an action to restrain defendants from taking ore from beneath the surface of plaintiff's ground, defendants had introduced evidence that the apex of the vein was in their ground, and that it could be traced to the point where they were working, evidence by plaintiff tending to show that the vein was not continuous was proper rebuttal. *Id.*

9. *Facts stand as found below.* The appellate court will not disturb the finding of the trial court, made on conflicting evidence, upon the fact questions of apex, dip and strike. *Id.*

10. *Counter presumptions.* Where plaintiff proves apex within his claim, and continuity downward, he is entitled to extralateral rights notwithstanding the *prima facie* presumption in favor of defendants' title to everything beneath the surface of his claim. *Montana O. P. Co.* v. *Boston Co.*, 471

11. *Deed carries apex rights.* A deed to a mining location or a parcel of a mining location, conveys extralateral rights with or without the clauses usually inserted in mining deeds. *Id.*

12. *Apex right on subdivided claim.* Where parcel of a mining claim was conveyed by metes and bounds and the end lines of the conveyed portion were not parallel with the end lines of the original location, the extralateral rights of the grantees will be defined by planes drawn parallel to the end lines of the original location at the points where the veins cross the end lines of the part conveyed. *Id.*

13. *Further developments after final injunction in apex case.* Plaintiff had secured a judgment giving it extralateral rights in certain ground. Afterwards it became a question whether certain newly opened ground was covered by the decree. *Held*, that contempt under the original decree would raise the issue and that it was error to file a new bill to quiet title. *Montana O. P. Co.* v. *Boston Co.*, 555

14. *The possession of the surface of a lode* mining claim is the possession of the lode to the full extent of the extralateral right of the owner of the claim. *Empire State Co.* v. *Bunker Hill Co.*, 560

15. *Segment of vein cut off by prior apex title.* The extralateral

APEX. *Continued.*

right of the owner of a lode mining claim extends to a portion of the lode between his end-line planes produced, although it is completely severed from that portion lying within the boundaries of the claim by the extralateral right of the owner of an older claim located on the same lode, whose end-line planes extended intersect both those of the newer claims, and his possession of the surface of his claim is possession of such detached portion of the lode. *Id.*

16. *Remedy by ejectment inadequate.* Where defendant owned a number of mining claims located on the same lode as the claim of complainant, under which it claimed extralateral rights in such lode adverse to those of complainant, and under one of which it had commenced to extract ore from such lode, the remedy of complainant at law by an action of ejectment was not adequate, so as to exclude the jurisdiction of equity to entertain a bill to quiet title to complainant's entire claim, including all that portion of the lode in which it claimed extralateral rights. *Id.*

17. *A vein is parcel of the location* which embraces it although it enters on its downward course under an adjacent location. *Davis* v. *Shepherd.* 575

18. *Vein leaving side line.* The right to follow the vein extralaterally ceases at the point where the vein leaves the side line. *Id.*

19. *Where the discovery vein leaves the claim through a side line* which fixes the limit of its extralateral rights to such discovery vein but a secondary vein is found having an apex going through both side lines such secondary vein has extralateral rights between the two points at which it leaves the side lines. *Ajax M. Co.* v. *Hilkey,* 585

20. *The end lines of the discovery vein* are not necessarily the end lines of a secondary vein; the extralateral rights of such secondary vein may extend beyond them. *Id.*

See ADVERSE POSSESSION, 2; END LINES, FAULT, INSPECTION, 5; LODE, TENANTS IN COMMON, 2; VERDICT, 1.

APPEAL.

1. *Costs on double appeal.* On dismissal of one of two appeals from a judgment on two separate records presenting the same question, costs will be allowed against appellant, though it was taken from an abundance of caution to settle a doubtful question of practice, and the appellant is successful on the other appeal. *Abbey* v. *Wheeler,* 86

2. *Appellate practice.* Where a judgment is entered by the general term reversing a judgment of the special term on demurrer, and directing a final judgment unless plaintiff shall amend

APPEAL. *Continued.*

his complaint within a certain time, it is not, when perfected by entry of final judgment dismissing complaint on failure of plaintiff to amend, a final determination of the general term on the issue raised by demurrer, and appealable to the court of appeals, but an appeal should be taken through the appellate division from the judgment so rendered. *Id.*

3. *Extent of review of findings of law and fact.* It is settled law in the federal courts that, where an action at law is tried to the court, its findings upon questions of fact are conclusive, and that the only matters reviewable in the appellate court are the rulings on questions of law, when properly presented by bill of exceptions, and, when special findings are made, whether the facts found are sufficient to sustain the judgment. *Empire State Co.* v. *Bunker Hill Co.*, 104

See INJUNCTION, 3; INSTRUCTIONS, PRACTICE, 7.

ASSIGNMENT.

See LEASE, 13; RENTS AND ROYALTIES.

BLASTING.

1. *Where land was conveyed with knowledge that it was to be used as a quarry* the vendor, still adjoining owner, could not complain of the noise of blasting or any legitimate use of the quarry, but is not estopped to complain of blasting carelessly conducted so as to throw rocks on his adjoining premises. *Wilkins* v. *Monson Co.*, 185

BONA FIDE PURCHASER.

1. *One who buys a mere equitable title* to land is not a bona fide purchaser without notice, but takes only such title as his vendor has, and subject to all defenses good against him, though in fact such purchaser had no notice of them. *Lowther Oil Co.* v. *Miller-Sibley Oil Co.*, 656

See OPTION, 4.

CERTIORARI—See PROHIBITION.

CONSIDERATION.

1. *One dollar* is technically a valuable consideration but even if paid the courts will look to the substantial reasons prompting the making of the grant. *Gadbury* v. *Ohio Co.*, 680

CONTEMPT.

1. *A defendant in contempt* cannot be punished by refusing to allow him to put in his evidence where he is a party to a cause on trial. That would be to deny to him due process of law. *Harley* v. *Montana O. P. Co.*, 550

CONTRACT.

1. *Written contract changed orally becomes oral.* Where a written memorandum is made of an oral contract for the sale of real property, and the terms of the contract are afterwards changed by oral agreement of the parties, the whole thereupon becomes an oral contract. *Snow* v. *Nelson*, 32

2. *Where a mining company deducts the board account* from the miners' wages it becomes a debtor to the boarding house keeper for money had and received to its use. *Cerrusite M. Co.* v. *Steele*, 456

See MEASURE OF DAMAGES, 10; OPTION; RESCISSION, 2; WAGES.

CONVEYANCE.

1. *Abandonment by grantee. Title by relocation acquired by grantor.*—McDermott sold a lode claim to the company by deed in which he granted, bargained and sold the premises with a special covenant that the deed should pass the patented title which it recited had been applied for. The patent application was not prosecuted to entry but on the contrary the company neglected to do the annual labor and allowed the lode to be relocated by a stranger who sold to McDermott. *Held*, that the title by relocation did not pass to the grantee company. *McDermott M. Co.* v. *McDermott*, 338

2. *When the description in a deed or devise is clear and explicit* and without ambiguity, there is no room for construction or for the admission of parol evidence, to prove that the parties intended something different. *King* v. *New York Co.*, 515

3. *Attempt to confine deed of all coal to one seam.*—Where an executor's deed conforming to the petition supporting the same, purported to convey all the coal underlying a certain area, parol evidence was not admissible to show that it was intended to convey only one certain seam of coal underlying the surface. *Id.*

4. *Deed valid without corporate resolution. Family affair.*—Where practically all the stock is held by husband and wife and daughter, who assent to receipt of money and to delivery of the corporate deed, the transaction is valid without formal authorization on the minutes. *Rubie Co.* v. *Princess Alice Co.*, 569

See APEX, 11-12; BLASTING, ESCROW, LOST PAPER, 1; OIL, 4.

CORPORATION.

1. *Corporation suing without filing statutory papers. The Arkansas statute* provides that every foreign corporation, before it shall be authorized to transact business in the state, shall file with the secretary of state a copy of its charter, and a certificate designating an agent on whom service of process may be had, and that any corporation failing to comply with the act shall be subject to a fine of $1,000, and shall not maintain any suit in the state. Plaintiff corporation sued before the passage of the act, and six months thereafter complied with its conditions. *Held*, that plaintiff's failure to immediately comply with the act did not preclude it from maintaining the action. *Buffalo Zinc Co.* v. *Crump*, 276

2. *The prosecution of a suit* is not transacting business within the act. *Id.*

3. *A director in a company* which forfeits to the government its title, in the absence of all collusion, may purchase and hold the title of the relocator of the claim. *McDermott M. Co.* v. *McDermott*, 338

4. *President cannot bind company to sell.*—Under Civ. Code, §§ 1012, 1013, providing that the trustees or officers of any mining corporation shall not have power to sell any part of the mining ground unless the sale is first authorized by a vote of two-thirds of all the stockholders at a meeting called for that purpose at which three-fourths of the stock is represented, a proposition by the president that on deposit of a specified sum as the purchase price the corporation will at once proceed to obtain the requisite consent of its stockholders for selling, and will then sell and convey a specified portion of its mining claim, and the acceptance of such proposition and deposit of the money, do not give the proposed purchaser an equitable title to the mine, or right to extract ore therefrom. *Anaconda M. Co.* v. *Heinze*, 346

See CONVEYANCE, 4; FRAUD, 3; WAGES, 2.

COSTS.

1. *The cost of models, surveys and development work* done in preparation of the trial of an apex case cannot be taxed as costs. *Montana O. P. Co.* v. *Boston Co.*, 471

2. *That statutory costs are allowed to official stenographers* does not authorize the taxation of such disbursement to private stenographers who attended in place of the official stenographer though by consent of parties and of the court. *Id.*

3. *Objections to the taxation of costs* are reviewable on appeal

COSTS. *Continued.*

from the judgment, and hence no appeal lies from the order of taxation. *Id.*

See APPEAL, 1.

COVENANT.—See LEASE, 14, 16.

CUSTOM.

1. *A custom to do an act made punishable by law* cannot be proved. *Jones* v. *Holden*, 523

DISCOVERY.

1. *Discovery after location.*—A mining claim located before the discovery of minerals thereon becomes a valid location, subject to ownership in co-tenancy, on the subsequent discovery of minerals by the locator; and one of the tenants afterward purchasing the adjoining claim, in which the lode worked in the former claim apexes, cannot hold the interest so acquired as his individual interest on the ground that the co-owners of the former claim were mere trespassers on the first claim, and not co-owners thereof. *Cedar Canyon Co.* v. *Yarwood*, 11

2. *Claim without discovery, void.*—The sale of a mining claim, upon which no discovery of mineral has ever been made, for stock, to make the stock paid up, is not a case of overvaluation but is a sale where no consideration passes because the deed conveys no title. *Buck v. Jones*, 467

3. *Discovery presumed after patent.*—After patent issued the question whether the vein patented contained mineral of value cannot be collaterally raised. *Davis* v. *Shepherd*, 575

4. A notice of location without discovery is a nullity. *Gemmell* v. *Swain*, 716

See ESTOPPEL, 1; PROSPECTOR, 2; TUNNEL, 5.

DITCH—See INJUNCTION, 6.

DUMP—See INSTROKE, 2.

EJECTMENT.

1. *The right to maintain ejectment depends on the possession* of the property at the time suit was brought, and the fact that plaintiff was in possession before or since is not material. *Walton* v. *Wild Goose M. Co.*, 680

See ADVERSE CLAIM, 2; APEX, 16; VERDICT, 3.

END LINES.

1. *Overlapping end lines.*—A junior locator may project the end line of his claim over the surface of a senior location for the purpose of fixing the extralateral right to so much of the vein located as is subject to location. *Davis* v. *Shepherd*, 575

See APEX, 20.

ESCROW.

1. *That an escrow deed delivered without authority*, or obtained fraudulently, conveys no title, is elementary law. *Rubie Co.* v. *Princess Alice Co.*, 569

ESTOPPEL.

1. *Acquiescence. Rise in value.*—Equity will not relieve against a forfeiture of stock where the shareholder has acquiesced in the same until a change of circumstances or conditions has arisen. *Joseph* v. *Davenport*, 171

2. *Estoppel to deny discovery.*—A complaint alleged that plaintiff and others were the owners of a mining claim by discovery, location, etc., and that the same had been wrongfully relocated by P., acting for W. P., in his answer, did not deny the original discovery by plaintiff; and W., in his notice of relocation, although he had never been upon the claim, set out the discovery. *Held*, that W. could not be heard to deny the original discovery. *Yarwood* v. *Johnson*, 398

3. *Allowing an adjoining claimant to work* through a shaft on plaintiff's ground is not an estoppel to deny defendant's title to the vein so approached. *Davis v. Shepherd*, 575

4. *To constitute an estoppel by silence* there must not only be an opportunity but an obligation to speak, and the purchase must have been in reliance upon the conduct of the party sought to be estopped. *Wiser* v. *Lawler*, 630

5. *Record title. Notice to improvers.*—A person holding a deed of property which he has placed upon record, is not ordinarily bound to disclose his title to persons contemplating purchasing, or making improvements upon the land, unless his silence be deceptive, or accompanied by an intention to defraud. *Id.*

6. *Estoppel* from conduct discussed. *Lowther Oil Co.* v. *Miller-Sibley Oil Co.*, 656

See ADVERSE CLAIM, 5; LACHES, 2; TENANTS IN COMMON, 3; VENDOR AND PURCHASER, 3.

EVIDENCE.

1. *Copies of affidavits.*—Where, on an application for an injunction, affidavits offered by defendants were received over plaintiff's objection that copies had not been served on his counsel, as required by the rules of the district court, and the record does not show the provisions of such rule, the supreme court is unable to say whether the ruling was erroneous. *Anaconda M. Co.* v. *Heinze*, 346

2. *Acquiesce to affidavit makes it deposition.*—Parties may by stipulation, or by silent acquiescence in the introduction of evidence of the statement or affidavit of a person, waive the right and opportunity to cross-examine him, and the prescribed forms for taking and certifying his testimony; and when this is done his statement or affidavit becomes as competent evidence of the facts it details as if every formality had been observed. *U. S.* v. *Homestake M. Co.*, 365

3. *A disputable presumption may be so completely overcome by subsequent* evidence in a case that it will become the duty of the court to instruct the jury that it cannot prevail. *Id.*

See EXPERT, LOCATION CERTIFICATE, 12, 13; MINERAL LAND, 1, 2.

EXHAUSTED MINE.

1. *Thorough prospecting* with some, but very slight, finding of ore held sufficient proof of exhausted mine and that the lessee was not bound to pay royalty on ore not to be got in the mine. *Hewitt M. Co.* v. *Dessau M. Co.*, 111

2. *A lessee is not bound to rob the pillars* to find ore. *Id.*

3. *Implied covenant that the mineral exists.*—Where a mining lease gave defendants the right to mine at an agreed royalty, binding them to a minimum tonnage per month and after exhaustive search no ore in paying quantities was found: *Held*, that the lease contained an implied covenant that such was to be found in the ground and that no royalty was recoverable. *Brooks* v. *Cook*, 456

EXPERT.

1. *The oil and gas well business is not one of which all persons and courts have general knowledge* and is therefore specially open for the opinion of experts. *Douthett* v. *Fort Pitt Co.*, 204

2. *Expert questions too remote.*—The opinions of miners as to the quantity of earth or gravel which a miner could move in a day were properly excluded, where they were not confined to ground of any particular character or condition or to any stated

EXPERT. *Continued.*

season, and the witnesses were not shown to be familiar with the ground in question in the action. *Walton* v. *Wild Goose M. Co.*, 680

FAULT.

1. *A fault in the vein does not prevent its owners following it* down on the apex, if its continuity through the fault is made apparent. *Anaconda M. Co.* v. *Heinze*, 346

FORFEITURE.

1. *Adventurers in working lease.*—A large number of persons took shares in a mining lease which was forfeitable for failure to work for 10 days. They received shares on their face liable to be sold if assessments were not promptly paid. After several assessments the lease became of great value. While under assessment several of the delinquent shares were sold. *Held*, that under such circumstances the sale of delinquent shares without notice or appraisement was valid. *Joseph* v. *Davenport*, 171

2. *Construction of clause as to time of sale of shares.*—In view of the necessity of prompt payments to comply with the terms of the lease and the manifest intent of the parties, the provision in the certificates that the sale of delinquent shares should "take place on the 10th day of the month following such failure," etc., should be construed to mean the 10th day of the same month after the default in payment of assessments. *Id.*

3. *Time of rent payment when not of the essence. Circumstances forbidding forfeiture.*—While a stipulation in an oil and gas lease, providing for a forfeiture of the lease for nonpayment of rent reserved, is inserted for the benefit of the lessor, and is to be strictly construed for his benefit and protection, yet, where the time of payment of such rental is neither in express terms nor by necessary implication made of the essence of the lease between the parties, equity may excuse the default in payment, and will not declare a forfeiture and cancellation of the lease in a case where it would be inequitable and unconscionable to so decree. *Edwards* v. *Iola Gas Co.*, 293

4. *Findings examined, and found sufficient*, in connection with a general finding in favor of the defendant, to excuse a refusal to enter a decree forfeiting the lease in controversy in this action. *Id.*

5. *While forfeitures in oil and gas leases are exceptionally favored*, yet it is not a rule of universal application that all defaults by the lessee entitle the landlord to a forfeiture. *Id.*

FORFEITURE. *Continued.*

6. *To the rule that equity will not enforce a forfeiture* an idle gas or oil well lease is an exception. *Gadbury* v. *Ohio Co.*, 680

See ABANDONMENT.

FRAUD.

1. *Fraud not proved.*—In a suit by the administrator of a deceased locator of a mining claim to declare that the patentee thereof is a trustee for the estate of the deceased, on the ground of fraud in procuring the patent, by presenting false affidavits averring that the original locator had conveyed his interest therein, evidence considered, and *held* to authorize a finding that such locator had conveyed his interest in the claim, and that therefore there was no fraud on the patentee's part in procuring the patent. *Scott* v. *Crouch*, 117

2. *Royalty reduced on false representation of lessee.*—The lessee of an iron mine under a lease by which it was agreed to pay a royalty of six cents per ton did not succeed, and while negotiating a sale of its plant represented to the lessors that the sale could not be made and mine operated unless the royalty was reduced to four cents. Relying upon such representations, the lessors agreed to make such reduction. Thereupon the lessee completed the sale and contracted with the purchaser that he should pay to it the royalty of six cents, as provided in the lease. On discovering the falsity of such representations, the lessors filed a bill against the lessee and purchaser to cancel such agreement to reduce the royalty on the ground that it was fraudulently obtained, and for an accounting for the two cents per ton for the ore mined. *Held*, that complainants were entitled to the relief prayed as against the original lessee. *Lasier* v. *Appleton Co.*, 229

3. *A corporation must respond for the fraudulent representations of its president* when making contracts on its behalf. *Id.*

4. *Use of brother's name mere subterfuge.*—Where it appeared that one of the co-tenants of a mining claim shortly after the discovery of valuable rock in the neighborhood gave his brother, who had never been on the claim, a description thereof, and the brother wrote out a notice of location and signed it, whereupon the co-owner relocated the claim in the name of the brother, a finding that the entry and location in the name of the brother was a mere subterfuge to defraud the co-tenants was warranted. *Yarwood* v. *Johnson*, 398

5. *Sufficiency of complaint for relief against fraudulent sale considered* and the same held to state a good cause of action. *Upton* v. *Weisling*, 601

FRAUD. *Continued.*

6. *Stock issued to part of the co-owners.*—Where co-owners between whom existed relations of trust and confidence agree to a sale to a company, stock in which is issued to one and not to another, the stock issue being concealed and the money price received stated to be the full consideration, the defrauded party is entitled to his proportionate share of such stock. *Id.*

7. *Mere knowledge of a fraud* without participation therein or sharing its profits is not sufficient to hold a party to a judgment for any share of such profits. *Id.*

8. *The knowledge of adjoining values acquired by a mining superintendent* or manager is the property of his employer, the company. *Clark* v. *Buffalo Hump M. Co.*, 672

9. *Application of the above rule. No relief where fraud on both sides.*—The owners of idle ground adjoining a deep working mine operated by a corporation conveyed a fifth interest in such idle ground to the company superintendent in consideration of his agreement to keep them posted in case the workings as they approached such ground indicated that the ore values extended into such idle ground. The operations of the company developed value in that direction which the superintendent concealed from his grantors the owners and on the contrary represented that the ground was "no good" and on such statement the company bought the other four-fifths for an apparently inadequate consideration. Complainants brought their bill to set this latter conveyance aside. *Held*, that their case was tainted by their attempt to obtain from the superintendent, knowledge of value which he could not rightfully sell or impart to strangers and that the court would not balance frauds between two wrongdoers. *Id.*

See AGENT; PROSPECTUS; SPECIFIC PERFORMANCE, 8.

INJUNCTION.

1. *Destruction of water right by shaft.*—Where a mining company has acquired the exclusive right to the use of the water of a certain creek in working its mines, another company has not the right, in developing its mine by means of a shaft near the creek, to cut off and divert the waters flowing into it. *Copper King* v. *Wabush M. Co.*, 164

2. *Comparative injury considered.*—Where, in an action to restrain defendants from diverting water from a creek which plaintiff has acquired the exclusive right to use, the rights of the parties are in dispute, and a temporary injunction will work less hardship than its refusal, it should be granted. *Id.*

3. *Injunction pending appeal.*—Only in unusual cases will the

INJUNCTION. *Continued.*

Supreme Court consider an application for an injunction pending the appeal. But the lower court retains full jurisdiction to preserve the property by the writ and in proper case should not hesitate to exercise it. *Ajax M. Co.* v. *Hilkey*, 259

4. *The fact that a new judge has taken office* since the original writ issued does not affect the jurisdiction of the *nisi prius* court over the enjoined premises pending the appeal. *Id.*

5. *No notice of trial between third parties.*—On an application for injunction to restrain defendants from removing ores from plaintiff's ground, the court cannot consider the evidence in another action involving the title to the same vein, but to which this plaintiff was not a party, or interested, either where such evidence is embraced in affidavits or on the court's own recollection thereof. *Anaconda M. Co.* v. *Heinze*, 346

6. *Want of equity in suit to enjoin placer ditch.*—Where the tail of defendant's mining ditch crossed plaintiff's land, who complained of overflow and debris but refused to allow defendant to build levees at his own expense to prevent all damage, and had allowed defendant without objection to make large expenditures in securing the water, the plaintiff has no case for an injunction. *McCann* v. *Wallace*, 389

7. *No injunction against prospect pits.*—An entry upon a mining claim to search and sink for lodes, sinking shafts through gravel and taking away no ore, even if an unlawful trespass is not a destruction of the estate and is not cause for an injunction. *Harley* v. *Montana P. Co.*, 550

8. *Posting location notice* is not a violation of an injunction against mining. *Id.*

9. *The granting of a preliminary injunction* rests in the discretion of the trial court, and its decision will not be reviewed unless it appears that its discretion was improvidently exercised.—*Empire State Co.* v. *Bunker Hill Co.*, 561

See APEX, 13; CONTEMPT, LACHES, 1; PRACTICE, 1; PROSPECTUS, 3; QUIET TITLE, 4.

INSPECTION.

1. *Every suit may be a proceeding* but not every proceeding is a suit. Where the act says that the costs of the proceeding shall abide the result of the suit it implies an inspection as a proceeding ancillary to a suit. *Peo.* v. *DeFrance*, 61

2. *There must be a suit pending* before an order of court for the inspection of a mine can be made under the Colorado statutes

INSPECTION. *Continued.*

providing for compulsory inspection and there can be no application independent of such suit. *Id.*

3. *That the case is not at issue* does not preclude the court from making an order for inspection. *State* v. *District Court*, 195

4. *Right to follow developments.*—That the petitioning party has complete maps up to the commencement of the suit is no reason why it should not have an order for inspection of further work. *Id.*

5. *Surface ground above and beyond point of controversy.*—Order allowing the party working within its own lines on the dip to enter the surface openings of the apex of the claimant on its own ground upheld. *Id.*

6. *An order should always be limited* to the inspection of those openings only which avail in the present controversy. *Id.*

7. *An inspection on the strike* beyond the point in controversy may be essential to determine the continuity of its direction as well as the angle of the dip. *Id.*

8. *The fact that the premises are under injunction* is no reason for refusing an inspection. *Id.*

9. *Inspections from time to time*, in this case weekly, under reasonable restrictions by means of two designated employees are usual and proper. *Id.*

10. *Petitioner having no interest.*—The law allowing of inspection of mining claims has no application and inspection will not be allowed where petitioner asserts no interest in the property of which inspection is sought or through which entry is necessary to inspect adjoining property. *State* v. *District Court*, 211

INSTROKE.

1. *Construction of instroke appurtenance.*—Where an operator of coal mines on a large scale on about 4,000 acres abutting on a small tract of 152 acres purchased the coal under such smaller tract, "together with the privilege of mining and removing through any entries made in said coal other coal belonging, or which may hereafter belong, to the grantee," the deed gave the grantee right to bring the coal from other land through the entries in the small tract, and not merely the right of passage through such entries. *Potter* v. *Rend*, 1

2. *No right to deposit gob from foreign coal.*—The same deed gave the right to sink a shaft, to deposit on the surface debris taken from such shaft and other privileges—but the right to deposit debris from the foreign coal was not granted. *Id.*

3. *Buying right to work by instroke.*—A share of profits paid

INSTROKE. *Continued.*

the owners of adjoining workings to enable the lessees to get at the leased ore was a legitimate item of expense. *Taylor* v. *Thomas*, 527

INSTRUCTIONS.

1. *The courts reading from the pleadings in its charge* is not erroneous if the issues raised are correctly stated. *Union G. M. Co.* v. *Crawford*, 213

2. *Error must be specific.*—The refusal of an instruction cannot be regarded as prejudicial error unless appellant points out the testimony requiring the refused instruction. *Davis* v. *Shepherd*, 575

3. *The statutory provision requiring instructions to be written* without oral explanation is not infringed by the court orally answering a question asked by the jury after they had retired where no possible injury could have resulted to the complaining party. *Walton* v. *Wild Goose M. Co.*, 680

See NEGLIGENCE, 2; PLACER, 3.

JURY.

1. *Trial by jury*—A defendant in suit to quiet title to real estate has no constitutional right to trial by jury in Montana. (PIGOTT, J., dissenting.) *Montana M. Co.* v. *Boston Co.*, 471

2. *Separation of jurors.*—In the absence of injury, a mere separation of the jury in civil cases, without the consent of the court, is not *per se* sufficient ground for a new trial. *Walton* v. *Wild Goose M. Co.*, 688

3. *That the bailiff in charge of the jury was properly instructed* will be presumed in the absence of either record of the fact or objection for want of the fact. *Id.*

4. *Statements made by jurors not under oath*, after the trial is over, are not competent evidence to show misconduct; and to warrant the granting of a new trial on that ground, the evidence of misconduct must be clear, certain, and convincing. *Id.*

LACHES.

1. *Laches of surface owner.*—Where the surface owner allows the owner of the coal to occupy the surface with costly improvements for many years she cannot ask a court of equity to prevent his removal of the same. *Potter* v. *Rend*, 1

2. *No estoppel by laches as to future trespass.*—Laches which will prevent equitable aid concerning past trespasses does not pre-

LACHES. *Continued.*

vent the party from electing to forbid continuance of the trespass and she may enjoin as to threatened future wrongful acts.

3. *Facts amounting to laches.*—Where, in a suit by the administrator of a deceased locator of a mining claim to declare the patentee thereof a trustee for the estate of the deceased, on the ground that an alleged lost and unrecorded deed, conveying the locator's interest in the mine, was not executed, it appeared that the locator for over 15 years made no claim as owner thereof, and had knowledge of the claims of other persons who during such time worked the mine, the right of recovery was barred by the locator's laches. *Scott* v. *Crouch*, 117

4. *If the property is of a speculative nature* it is the duty of a complaining party to put forward his complaint at the earliest possible time. *Joseph* v. *Davenport*, 171

See SPECIFIC PERFORMANCE, 6.

LAND OFFICE.

1. *Land office rulings not binding on persons not parties.* The judgments of the land department permitting entries of land and the patents based upon those entries bind all the parties to the proceedings which resulted in them and all those claiming interests acquired from such parties subsequent to the entries. But they do not estop those who were not, and were not required to be, parties to the proceedings from establishing by the customary evidence the truth relative to any fact material to their claims in any litigation between them and the holders under the patents. *Uinta Co.* v. *Creede Co.*, 445

2. *The cancellation of a land office entry* does not invalidate the location of the claim, nor render the ground open to relocation. *Rebecca Co.* v. *Bryant*, 538

3. *Erroneous exclusion of ground by land office.*—Where patent issued to the C. O. D. lode excluding an overlap claimed by the Rebecca lode whereupon such overlap was entered by the Rebecca lode on its own application for patent but the entry as to such overlap was without notice and erroneously cancelled and the patent issued excluding the overlap: *Held*, that such wrongful action of the land office did not divest the Rebecca title and that it could claim the ground by virtue of its receiver's receipt. *Id.*

4. *The decisions of the land department*, though not binding as precedents, should not be overruled where not clearly erroneous. *Lavagnino* v. *Uhlig*, 610

See PROTEST.

LEASE.

1. *The governing principle in gas and oil leases* is that the discovery and production of gas or oil is a condition precedent to the existence and continuance of any vested estate in the demised premises. *Federal Oil Co.* v. *Western Oil Co.*, 25

2. *Fatal delay.*—Where, under a lease for the purpose of drilling and operating for oil and gas, the only consideration to the lessor is the prospective royalties to arise from exploration and development, and the lessee fails for eight months to commence such development, the agreement is without consideration, and may be abandoned by the lessor. *Id.*

3. *Agreement to complete wells.*—Where in a lease of oil lands, the lessee agrees to complete a second well within 90 days after the completion of the first well, but does not agree to complete or even to commence the first well, such agreement as to the second well is no consideration for the contract. *Id.*

4. *Lesser's right to treat lease as abandoned though one well sunk.*—An agreement whereby certain lands, in consideration of $50, are granted, demised, leased, and let for the sole and only purpose of boring, mining, and operating for oil and gas, and laying pipes and building tanks, stations, and houses thereon to take care of the products, for the period of 15 years, and providing that the lessee shall complete one well on the premises within one year from its date, or pay the lessor a rental of 50 cents an acre for each year the lease may remain in full force after the first year, immediately after which provision the following stipulations are written: "But it is agreed and understood that the fifty dollars, paid in cash, is to pay all rentals on this lease for the period of one year from the date hereof. It is further agreed that when the first well is completed on said premises, then all cash rentals shall cease,"—does not bind the lessee to do anything further after completing one well on the premises, and upon his abandonment of further operations upon the premises for more than 18 months, leaving the well unprotected, so that it caved in and partially filled up, the lessor after waiting a year or more from the date of abandonment, had the right to lease the land to another. *Parish Fork Co.* v. *Bridgewater Co.*, 145

5. *No title to the oil in the lessee.*—The principal purpose and design of the parties to such a lease, clearly discernible from its terms, being the production and marketing of the oil and gas in the land for their mutual benefit; mere discovery of oil by exploration under it vests no title to it in the lessee, but it does vest in him the right to produce and take the same in accordance with the terms and conditions of the contract. In

LEASE. *Continued.*

such right the lessee will be protected, but he must proceed to exercise it with reasonable promptness and diligence. *Id.*

6. *Development favored.*—When its terms will permit it under the rules of law, an oil lease will be so construed as to promote development and prevent delay and unproductiveness. *Id.*

7. *Distinction between quitting work and surrender of lease.*—The law recognizes a distinction between the abandonment of operations under an oil lease and an intention to abandon or surrender the lease itself. Unless bound by the terms of the lease so to do, it will not permit the lessee to hold the lease without operating under it, and thereby prevent the lessor from operating on the land or leasing it to others. *Id.*

8. *Lease subject to reserves of lessor's deed.*—Where a deed of land reserves the minerals and a lease from the party holding under such deed is made subject to the exceptions in lessor's original deed the lessee takes no title to the minerals and such deed will not support assumpsit by the lessee to recover the value of such minerals removed by a third party. *Phelps* v. *Church of Our Lady*, 233

9. *Option to sink or pay rent.*—An oil lease which required certain wells to be completed within stated times contained the following: "In case no well is completed within thirty days from this date, then this grant shall become null and void, unless second party shall pay to first party thirty dollars each and every month in advance while such completion is delayed." *Held*, that this did not constitute a promise or obligation to pay rental; and *held*, further, that the lessee had the option to complete wells or pay rentals to keep the lease alive, and that upon breach of the agreement to complete wells no action would lie for the recovery of rentals. *Van Etten* v. *Kelly*, 269

10. *Lease from year to year.*—Where a lease for oil and gas allows the lessee two years to sink and then provides for further time on payment in advance of an annual rent such lease is a lease from year to year until a well is completed. *Lowther Oil Co.* v. *Guffey*, 545

11. *Reasonable time to lie idle, paying rental.*—A court of equity would relieve against a clause in a lease allowing an oil and gas lessee to continue idle indefinitely on payment of a nominal rent. But not where he has only been waiting a reasonable time to ascertain the probability of success in sinking. *Id.*

12. *Consideration payable out of net proceeds.*—Where the assignee of a mining lease agrees to pay a consideration therefor out of the net proceeds of the mine, such assignee is not bound to continue work at a loss after reasonable expenditures show that

LEASE. *Continued.*

net proceeds can never be reasonably expected. *Caley* v. *Portland*, 595

13. *Such assigned lease may be again assigned* without personal liability against the assignor for breach of covenant. *Id.*

14. *A covenant to work* is not necessarily a covenant for continuous work. *Id.*

15. *Ousted first lessee claiming compensation out of royalties.*—A lessor executes at different times two sets of oil leases to two different lessees, reserving the usual royalty, and, after the first leases have been avoided by the execution of the second, the first lessee pays two years' rental or commutation money to the lessor, with full knowledge of the execution of the second leases. Such payment does not entitle such lessee to claim the reserved royalty, or any part thereof, either in law or in equity. *Eclipse Oil Co.* v. *Garner*, 626

16. *Implied covenant to operate.*—Where the substantial consideration of an oil and gas well is the expected royalties there is an implied condition that the well will be operated. *Eclipse Oil Co.* v. *Garner*, 680

See ABANDONMENT, 4; ACCOUNT; EXHAUSTED MINE; FORFEITURE; LIEN, 1; MEASURE OF DAMAGES, 3, 4; NATURAL GAS; NEGLIGENCE, 3; OIL; RENTS AND ROYALTIES.

LICENSE—See PROSPECTOR, 1.

LIEN.

1. *A lien on ore* attempted to be reserved by terms of the lease is not binding against a purchaser of the ore. *Hewitt M. Co.* v. *Dessau M. Co.*, 111

2. *Retaining equity jurisdiction.*—On a bill to enforce a lien there being no suggestion that when suit was brought the property was not in existence or within reach of the decree, equity will retain jurisdiction and give personal judgment although the ore sought to be liened may have been sold and shipped. *Id.*

See MECHANICS' LIEN.

LOCATION.

1. *Necessity of posting location notice.*—In New Mexico a preliminary or discovery notice of location of a mining claim is unknown to our laws, and a locator, as against a subsequent locator who enters peaceably, must post such a notice as, when a copy thereof is recorded, the record will meet the requirements

LOCATION. *Continued.*

of section 2324 of the Revised statutes of the United States. *Deeney* v. *Mineral Creek Co.*, 47

2. *The same as to staking claim.*—In instructing the jury, the court omitted to mention the requirements of Sess. Laws 1889, c. 25, § 2, in force when the location was made, as to manner of marking the boundaries of the claim on the ground. *Held*, error. *Id.*

3. *Immaterial default as to time.*—Though notices of the location of mining claims were not recorded within 30 days, they are sufficient, if recorded before any adverse rights are acquired. *Buffalo Zinc Co.* v. *Crump*, 276

4. *Possession good against nominal locations.*—Where locators of mining claims never undertook to develop and maintain them, and other claimants took possession and held and developed them for a longer time than the period of limitation, the title of the last claimants was good, as against any one except the government. *Id.*

5. *Where years later, witnesses do not find the stakes*, their negative testimony after such a period, is no contradiction of the testimony as to the original staking. *Temescal Co.* v. *Salcido*, 360

6. *Staking center line sufficient marking of boundaries.*—Rev. Stat. U. S. § 2324, which provides that in marking a mining claim "the location must be distinctly marked on the ground so that its boundaries can be readily traced," does not require the boundary lines to be indicated by physical marks or monuments, nor define what kind of marks shall be made, nor on what part of the ground claimed; but any marking, whether by stakes, mounds, monuments, or written notices, whereby the boundaries can be readily traced, is sufficient. *Oregon King Co.* v. *Brown*, 414

7. *Location valid as to third parties.*—Where a claim apparently junior overlaps another claim apparently senior, but the senior disclaims title to the overlap, the owners of a third location cannot contest the validity of the title upon such points as the senior claim might have asserted. *Rebecca Co.* v. *Bryant*, 538

8. *Width, how fixed.* Where the end lines of a mining claim are not at right angles with the side lines, the distance between the side lines, and not the length of the end lines, measures the width of the claim. *Davis* v. *Shepherd*, 575

9. *Location over old stope.*—The fact that before the location of plaintiff's claim a part of a vein apexing therein and also in defendant's claim, had been stoped out by defendant at a point beyond the surface lines of plaintiff's claim, did not destroy plain-

LOCATION. *Continued.*

tiff's extralateral rights to the vein below the point of removal. *Id.*

10. *The special act forbidding land office employes* to purchase public land is not repealed by the general terms of the Mining Acts where the mineral lands are declared open to all citizens. *Lavagnino* v. *Uhlig*, 610

11. *Location by U. S. Surveyor.*—The act forbidding acquisition of title by such employes covers the case of a deputy U. S. mineral surveyor and his location of a mining claim is therefore void and his conveyance of such claim passes no title. *Id.*

See ADMISSIONS, DISCOVERY, END-LINES, LAND OFFICE, 2; PLACER RELOCATION.

LOCATION CERTIFICATE.

1. *A tie to a mine is a valid tie.*—A description in the notice of location of a mining claim is sufficient, under section 2324, Rev. St. U. S., and section 3102, Rev. St. Idaho, which describes the claim as located a certain number of feet from another mine, giving the direction, as a mine is a "natural object" or "permanent monument," within the meaning of those terms as used in said statutes. *Morrison* v. *Regan*, 70

2. *Sufficient description.*—A location certificate containing the following description *held* sufficient, under the provisions of said section 2324, Rev. St. U. S., and section 3102, Rev. St. Idaho, to wit: That the locators "have located 600 linear feet along this lode or vein of quartz, by 300 feet on each side of the middle of the vein or lode, making 600 feet in length. This claim so located is named the 'Bullion Mine,' and is situated in French mining district, Owyhee county, Idaho territory, and is described as follows: Commencing at this stake and notice, which is situated about 300 feet in a northwesterly direction from the Minnesota mine; this is an extension of the Red Jacket mine; and running thence along the vein or lode in a southerly direction to a similar stake and notice. We the undersigned, claim 600 linear feet in a southerly direction from this stake and notice to a similar stake and notice. This claim is 600 linear feet long." *Id.*

3. *When courts may reject.*—It is only where the location certificate fails to make reference to natural objects or permanent monuments sufficient to identify the claim that a court may reject it on that ground. *Id.*

4. *Good faith. Sufficient notice.*—Where it is shown that a mining claim has been located in good faith, if by any reasonable construction the language used in the notice in the description

LOCATION CERTIFICATE. *Continued.*

and in referring to natural objects and permanent monuments will impart notice to a subsequent locator it is sufficient. *Id.*

5. *A liberal construction* should be given to descriptions of mining claims and references to natural objects in location certificate. *Id.*

6. *Tieing to other claims.*—Other mining claims may properly be used in a mining location to designate the boundaries of the claim, as it is a sufficient reference to natural objects and permanent monuments to comply with the statute. *Shattuck* v. *Costello*, 136

7. *Such ties presumptively valid monuments.*—A party contesting the validity of a mining location described by reference to other mining claims on the ground that the latter claims have no existence has the burden of showing such fact. *Id.*

8. *Sufficient description.*—A description of a mining claim as: "Beginning at the N. W. corner of El Williams, 1—16, at a black oak post; thence 1,500 feet north between Sec. 10 & 11 to a dogwood bush; thence 600 feet E. to a dogwood bush; thence 1,500 feet south to oak post in Williams' field; thence 600 feet to place of beginning. This being in the northwest quarter of the southwest quarter, Sec. 11, T. 17, range 15 W.,"—is sufficient; it being presumed, in the absence of any contrary evidence, that "El Williams 1—16" is some well-known natural object. *Buffalo Zinc Co.* v. *Crump*, 276

9. *Substantial copy of notice sufficient.*—Under St. Or. Oct. 14, 1898, providing for the recording of notices of the discovery and location of mining claims, it is not essential to the validity of a location that the record should be a literal copy of the notices posted on the claim, but it is sufficient if it is a substantial copy.—*Oregon King Co.* v. *Brown*, 414

10. *Certificates of location of mining claims are not conclusive evidence* of the facts which they recite against parties who claim the land they describe adversely to their makers. *Uinta Co.* v. *Creede Co.*, 446

11. *Location certificate when immaterial.*—Where defendant claimed an intersection of veins in their course downward, but failed to prove such intersection, the exclusion of his location certificate to show that he had the oldest location, becomes immaterial. *Montana O. P. Co.* v. *Boston Co.*, 471

12. *The introduction of the location certificate as evidence* before proof of the location itself is permissible in the discretion of the court. *Walton* v. *Wild Goose M. Co.*, 680

13. *Notices of location of mining claims are to be liberally con-*

LOCATION CERTIFICATE. *Continued.*

strued, and are not invalid because of mistakes therein as to courses and distances. *Id.*

LODE.

1. *Lode defined.*—A lode or vein is a body of mineral or mineral body of rock within defined boundaries in the general mass of a mountain. *Buffalo Zinc Co.* v. *Crump*, 276

2. *Proof of* 2,800 *feet of continuous vein.*—Evidence considered, and *held* to establish the existence of a vein or lode apexing within the surface boundaries of a mining claim, and having continuity lengthwise of the claim to the extent and in the direction necessary to carry extralateral rights therein between the extended end line planes of the claim, and also to show the continuity and persistence of such vein, in its dip or downward course, extending to the lowest point to which the workings had been carried. *Pennsylvania M. Co.* v. *Grass Valley Co.*, 307

3. *Continuity not destroyed by complications or spurs.*—In a lode or vein having its apex in the surface of a mining claim and a westward dip, after it was followed down several hundred feet, and beyond the side line planes of the claim, through which distance it was a comparatively simple fissure vein, there occurred at some points what were technically termed "complications." The fissure would flatten and pinch out, but before reaching that point there would fall from it a series of small mineralized fissures having an eastward dip, and connecting, at a depth downward of six or eight feet, with another underlapping west dip fissure. This latter pinched out in a short distance on its upward course, but on its downward course it strengthened, and became again a strong ore-bearing vein. Wherever these complications occurred, the miners, in the practical working of the mine, dropped to the underlapping fissure, and followed it as the continuation of the main vein in its downward course. The east dip fissures did not appear to cut across either of those having a west dip, but merely connected them. At other points both north and south of the places where these complications occurred the vein was continuous and unbroken down to the lowest level of the workings. *Held*, that such complications did not break the continuity of the vein, the overlapping and underlapping fissures being portions of the same vein, and that the owner of the claim in which it apexed was entitled to follow it beyond them. *Id.*

4. *The finding of old stopes* in parts of the mine worked at an early date is most thorough proof of the continuity of the vein at such points. *Id.*

LOST PAPER.

1. *Parol proof of lost deed.*—Though a mining claim can only be conveyed by a deed in writing duly executed and delivered, the due execution and delivery of such a deed, which was not recorded, and which was lost, may be proved by parol testimony. *Scott* v. *Crouch*, 117

2. *Slight proof sufficient after lapse of time.*—A party claiming title through a grantee in a lost and unrecorded deed will not be required, after the parties to the transaction are dead, or cannot be found, and after the lapse of several years without the grantor, or any one for or through him, claiming any interest in the property, to furnish the high degree of proof of the due execution and delivery of the lost deed that is generally required. *Id.*

MARBLE—See MINERALS.

MASTER AND SERVANT.

1. *Company knows its own employees.*—Defendant company, in an action for injuries to a servant caused by the negligence of a person in its mine, cannot require plaintiff to make the complaint more specific by stating whether such person was an employe of defendant, as it has knowledge of such fact. *Union G. M. Co.* v. *Crawford*, 213

2. *Servant of lessor not fellow to servant of lessee.*—A servant of a mining company, working at the bottom of a shaft which is operated by the company to hoist ore from the various levels of the mine for lessees of the levels, and an employee of a lessee allowing ore to fall and injure the former, are not fellow servants. *Id.*

See NEGLIGENCE.

MAXIMS.

1. *Sic utere tuo* is the maxim which controls the use of their respective lands between a quarry owner and his neighbors. *Wilkins* v. *Monson Co.*, 185

MEASURE OF DAMAGES.

1. *Good faith controls measure of damage.*—There being evidence that in cutting the timber defendant acted under what he believed to be the lawful authority of the United States, a request that the court direct a verdict for the United States for the full amount prayed for, on the ground that it had been proven that the

MEASURE OF DAMAGES. *Continued.*

lands were public lands, and that defendant had cut the timber without authority, was properly refused, because ignoring defendant's good faith. *U. S.* v. *Van Winkle*, 56

2. *In case defendant cut the timber in good faith*, he was only liable for the value of the timber as cut, and not as manufactured. *Id.*

3. *Parties in interest not joining in a lease* are entitled against a party mining under a lease obtained in good faith from some of them, to damages only to the extent of actual value of their property taken, that is to mere compensation, to be reached by assessing a fair royalty and without considering the value of improvements placed by the lessee. *Gerkins* v. *Kentucky Salt Co.*, 189

4. *Apportionment where lessee works several wells.*—Where lessee of a gas well made a pipe of four times the capacity of the leased well, intending to use it in connection with other wells, he is entitled on an accounting to only one-fourth of its cost. *Id.*

5. *Loss of foot.*—Where the evidence in a personal injury case shows that defendant's injuries compelled the amputation of a foot, and that he lost the use of a finger, and had his skull fractured, and was unable to work, a verdict for $15,000 is not excessive. *Union G. M. Co.* v. *Crawford*, 214

6. *Measure of damages in trespass depends on intent.* The measure of damages for the willful or intentional taking of ore or timber from the land of another without right is the enhanced value of the ore or timber when it is finally converted to the use of the trespasser. But the limit of the liability for damages of one who takes ore or timber from the land of another through inadvertance or mistake, or in the honest belief that he is acting within his legal rights, is the value of the ore in the mine or the value of the timber in the trees. *U. S.* v. *Homestake Co.*, 365

7. *The test of the intent.*—The test which determines whether one was a willful or an innocent trespasser is not his violation of or compliance with the law, but his honest belief and actual intention at the time he committed the trespass, and neither a justification of his acts nor any other complete defense to them is essential to establishing the fact that he was not a willful trespasser. *Id.*

8. *The fact that one acted on the advice of reputable counsel* is persuasive evidence of his good faith. And one who honestly follows the erroneous advice of such counsel upon questions of legal right concerning which a layman would hardly have actual knowledge is not chargeable with bad faith, or with the willful

MEASURE OF DAMAGES. *Continued.*

intent to commit a wrongful act, because his counsel was mistaken on the law. *Id.*

9. *Evidence to mitigate the damages is admissible under the general denial* in actions for unliquidated damages for torts. *Id.*

10. *The measure of damages for breach of a contract to buy the output of a coal mine* is, in the absence of proof that the coal has no market value, the difference between the market value and the contract price. *Kincaid* v. *Price*, 382

MECHANICS' LIEN.

1. *Sale contract requiring improvements liens the fee.* Where under an executory contract for the sale of a mine the intending buyer is obliged to place improvements upon the property, the party furnishing the materials for such improvements under such contract has a lien upon the real estate as well as upon the improvements. *Hendrie & Bolthoff Co.* v. *Holy Cross Co.*, 179

MINERAL LAND.

1. *Official geological map to show character of land.*—On an issue whether public land on which timber was cut by defendant was mineral land, within Act Cong. June 3, 1878, authorizing residents of certain mineral districts to cut timber on mineral lands, a geological map of the territory in which the lands were located, issued by authority of interior department, was admissible for use in connection with the evidence of witnesses, and to show the general nature of the land described, its elevation and surroundings, and its situation with relation to lands proven to be mineral, were not in any way purporting to show the nature of the land in controversy, or to indicate that it was mineral. *U. S.* v. *Van Winkle*, 56

2. *Topographical map of survey.*—The admission of a certified copy of the "general description of the survey" of the township in which the land in controversy was situated, containing no reference to the particular land, but referring in general terms to the township, stating that it was mountainous, and that considerable placer mining had been done along a certain creek, and expressing the opinion that undeveloped quartz ledges existed in the ridges, even if error, could not have prejudiced plaintiff. *Id.*

MINERALS.

1. *Marble is a mineral.*—Under the law of New York, as settled by its court of appeals, marble in place is a "mineral," and the title thereto does not pass by a conveyance of the land which

MINERALS. *Continued.*

excepts and reserves to the grantor all mines and minerals which may be found therein. *Phelps* v. *Church of Our Lady*, 233

NATURAL GAS.

1. *Trade meaning to "gas" disallowed.*—A lease granted the right to drill for oil and gas, with a provision for a certain rental if gas was obtained, and without any distinction as to whether the gas was derived from gas or oil wells. *Held*, that the evidence was inadmissible to show that the word "gas" as used in the lease in trade usage meant gas derived from a gas well, and not gas from an oil well. *Burton* v. *Forest Oil Co.*, 507

See ACCOUNT, EXPERT, FORFEITURE, LEASE, OIL.

NEGLIGENCE.

1. *An instruction, in a personal injury case*, that the verdict must be for plaintiff if his injuries were occasioned by defendant's negligence, is not erroneous in using the word "occasioned" instead of "caused." *Union G. M. Co.* v. *Crawford*, 213

2. *"Likely" to prove permanent.*—An instruction that, in estimating damages, the jury should consider the nature of the injuries suffered, as to whether they are "likely" to prove permanent, or temporary only, is not erroneous in using the word "likely," as authorizing conjectures in determining the nature of the injuries. *Id.*

3. *In bad condition when leased.*—Where a level in a mine is in the same negligent condition when leased by the owner as at the time of a subsequent injury of an employee of the owner, in a shaft operated by him, resulting from such condition, the owner is responsible therefor. *Id.*

4. *No barrier at foot of incline level.*—The construction, in an upper level of a mine, of an ore tramway on such a grade that cars started thereon, or starting by gravity, will run into the shaft by their own momentum, without providing sufficient barriers to prevent their falling down the shaft, is negligence. *Id.*

5. *Proximate cause.*—A mine owner leased a level having an ore tramway running to a shaft, constructed so that a car would run into the shaft, which was operated by the owner for the benefit of the lessees; and an employee of the lessee, without being guilty of negligence, allowed a car to run into the shaft and injure an employee of the owner. *Held*, that the negligent construction of the tramway without barriers was the proximate cause of the injury. *Id.*

NONSUIT.

1. *A motion for nonsuit is waived by the introduction of evidence* after it has been overruled, and the ruling thereon cannot be assigned as error in the appellate court. *Walton* v. *Wild Goose M. C.*, 680

NOTICE.

1. *Notice binds to avoid consequences.*—Where a mine owner, at the time of commencing a shaft which cut off the waters flowing into a creek which another mine owner had acquired the exclusive right to use, was cautioned by the latter against cutting off such water, he is bound with notice of the consequences of his acts. *Copper King* v. *Wabash M. Co.*, 164

See ESTOPPEL, 5; LOCATION CERTIFICATE, 4; POSSESSION, 2.

OIL.

1. *Oil being a fluid*, is governed to some extent by rulings applicable to salt and mineral waters. *Wagner* v. *Mallory*, 42

2. *A lessee has no property in the oil* until it is brought to surface and reduced to possession. *Id.*

3. *Personal property.*—By statute in New York oil wells operated by lease or license are personal property for all purposes except taxation. *Id.*

4. *A deed purporting to convey real estate* does not convey an oil lease, such lease being personal property, and it is not covered by the phrase " all the lands . . . in which they have an interest." *Wagner* v. *Mallory*, 41 App. Div. 126. Affirmed. *Id.*

5. *Owner's rights to compel lessee to shoot the well.*—Defendant contracted to sink for oil or gas. Oil was generally found at the 100 foot sand. The contract read: "If neither gas nor oil are found in paying quantities sooner the plaintiff shall drill well into the fourth sand." When the 100 foot sand was reached plaintiffs claimed the right to compel the defendant to shoot the well for oil at the 100 foot sand. *Held*, that he had that right and that the danger of destroying the well was not so great as to prevent allowance of such proceeding. *Douthett* v. *Fort Pitt Co.*, 204

6. *Oil and gas rights follow the property.*—Where an oil and gas lease is made by one party to another covering two or more separate tracts of land, and is made to extend to the heirs and assigns of the parties, and different persons become the owners of such different tracts, each owner is entitled to the oil and gas produced on his tract, and to the royalty and rental arising from such tract. *Northwestern Ohio Co.* v. *Ullery*, 647

OIL. *Continued.*

7. *Oil lease a right of search, only.*—Title under a lease only for production of oil and gas is inchoate and contingent, and for purposes of search only until oil or gas is found. If not found, no estate vests in the lessee, and his right, whatever it is, ends when the unsuccessful search is abandoned. If found, then the right to produce becomes a vested right upon the terms of the lease. Point 2 of syllabus in Oil Co. v. Gas Co. 42 S. E. 655, 51 W. Va. 583, explained. *Lowther Oil Co.* v. *Miller-Sibley Oil Co.*, 656

8. *Power of chancery to cancel oil leases* for delay of development. *Id.*

9. *Oil in paying quantities.*—Where an oil and gas lease is for a given term, "and as much longer as oil and gas can be produced in paying quantities" to the lessee, if a well pays a profit—even a small one—over operating expenses, it produces "in paying quantity," though it may never repay its cost, and the operation as a whole may result in loss. The phrase "paying quantity" is to be construed with reference to the judgment of the operator, when exercised in good faith. *Id.*

10. *Plugging well after gas struck.*—A lessee under implied covenant to operate may not plug the well after gas is struck. *Gadbury* v. *Ohio Co.*, 680

11. *Failure for two years* of the grantee of the oil and gas in land to develop it, after constructing a well, finding gas, and then closing it, *prima facie* authorizes the grantor, who was to be paid $100 a year for each well while gas was being used off the premises, without demand, to treat the grant as abandoned. *Id.*

See ABANDONMENT, 4; ACCOUNT, EXPERT, FORFEITURE, LEASE.

OPTION.

1. *Time of first payment not specified.*—Where the written memorandum of an oral contract of sale of mining property is not certain as to the time when the first payment is to be made, it is insufficient to take the contract out of the statute of frauds, time being of the essence of contracts relating to such properties. *Snow* v. *Nelson*, 32

2. *Option to purchase.—When not assignable.*—Where an option not assignable in terms, to purchase mining property, is given to one who represents himself to be the agent and acting for a party known to the owner, and to whom he desires to sell, such option is not assignable. *Id.*

3. *Right to withdraw option.*—Where a mine owner gives an option to purchase his mines, he may withdraw such option at any time before its acceptance. *Id.*

OPTION. *Continued.*

4. *Option holder not treated as purchaser for value.*—The assignee of a contract which does not convey an interest in land, but only an option, is not protected against defects which could be asserted against his assignor, as protection to purchasers for valuable consideration extends only to cases where they have purchased the legal title. *National Oil Co.*, v. *Teel*, 263

5. *The contract was within Rev. St. Art. 309*, declaring "written instruments not negotiable by law" subject to all defenses in the hands of a purchaser that might be asserted against the original parties. *Id.*

See SPECIFIC PERFORMANCE, 1-5; VENDOR AND PURCHASER, 1.

PARTNERSHIP.

1. *Ownership without working.*—A mining partnership can only exist where several parties co-operate in working the mining property; mere ownership as tenants in common not being sufficient. *Hartney* v. *Gosling*, 239

2. *Power to buy but not to borrow.*—In a mining partnership pure and simple one partner has no implied authority to borrow money on the credit of the firm, but his implied powers only permit him to bind his copartners by dealings on credit for the purpose of working the mine, where it appears to be necessary or usual in the management of the business. *Id.*

3. *Swearing to conclusions.*—In an action against mining partners to recover for supplies furnished one of their number by plaintiff, when the partnership contract did not make defendants liable therefor, it was not error to permit defendants to state that they had not specially authorized the partner to bind them for the supplies. *Id.*

4. *Letter of one partner.*—Where a mining partnership contract did not itself make defendants liable for supplies sold one of their number, a letter written him by another partner, authorizing him to buy the supplies, could not have the effect to bind the other partners, in the absence of evidence that they knew of or authorized its being written. *Id.*

5. *Supplies already bought.*—Such letter would not bind the partner writing it for supplies bought from plaintiff before it was written. *Id.*

6. *Such letter would be admissible against the partner writing it* as to supplies bought from plaintiff after it had been shown to him. *Id.*

7. *Exclusion of such letter* as against the partner writing it, and as to supplies bought after it was shown to plaintiff, was re-

PARTNERSHIP. *Continued.*

versible error, though plaintiff's testimony giving its contents went in without objection, where it was apparent that the court did not regard such testimony as material. *Id.*

See PROSPECTING CONTRACT; TENANTS IN COMMON.

PATENT.

1. *Common law grant.*—Except as enlarged by the terms of the mining acts the rights of the holder of a mining claim are the same as the rights of the owner of land under the common law. *St. Louis M. Co.* v. *Montana M. Co.*, 127

2. *The patent when issued relates back* to the inception of the right of the patentee. *Neilson* v. *Champagne M. Co.*, 438

See APEX, 6; DISCOVERY, 3; PROTEST, 3; RECEIVER'S RECEIPT; TOWN SITE, 2; TUNNEL, 4-5.

PLACER.

1. *A placer location on ore* found in leads or lodes is void. *Buffalo Zinc Co.* v. *Crump*, 276

2. *Sufficient location of placer quarter section.*—Where one corner of the claim was also a government corner which was found in place and there was proof of placing a stake at time of original location at each corner there is sufficient proof of a location. *Temescal Co.* v. *Salcido*, 360

3. *Full set of instructions* as to what constitutes a placer location and the doing of the assessment work on a placer claim, considered and approved. *Walton* v. *Wild Goose M. Co.*, 680

PLEADING.

1. *Construction of pleadings.*—The complaint in an action for possession of a mining lode claim alleged that plaintiff had made a corrected location of the same. The answer denied that plaintiff had any right to make the correction, as defendants had prior to that time located the lands, and were in possession. *Held*, that the legality and sufficiency of the corrected location were not put in issue, but only plaintiff's right to enter on the land to make it. *Buffalo Zinc Co.* v. *Crump*, 276

2. *Complaint with double aspect.*—Complaint alleged that one of defendants, a co-tenant with plaintiff, had relocated the claim in the name of said defendant's brother although the annual labor for the year had been done. That if not done it was by the collusion of said defendant, who had agreed himself to do the work.

PLEADING. *Continued.*

Held, that, on either alternative it stated a cause of action. *Yarwood* v. *Johnson*, 398

3. *Relief whether work done or not done.*—It was not error to refuse to compel plaintiff to elect whether he would stand on the allegation that the required amount of work was done, or that, if not, it was through the fraud, etc., of defendant, since more than one state of facts might establish the wrong complained of. *Id.*

See STATUTE OF FRAUDS.

POSSESSION.

1. *Possession not negatived by averment of trespass.*—A bill by the owner of a lode mining claim to quiet his title to his claim, including that portion of the lode within his extralateral rights, which alleges possession of the claim by complainant, does not negative such allegation as to a portion of the lode within such extralateral right, and show possession thereof in defendant, because it alleges a trespass thereon, and the removal of ore therefrom by defendant, and prays for an injunction. *Empire State Co.* v. *Bunker Hill Co.*, 560

2. *Actual possession is notice* to purchasers of the rights of him in possession. *Lowther Oil Co.* v. *Miller-Sibley Co.*, 657

See ADVERSE CLAIM, 9; APEX, 14; EJECTMENT; LOCATION, 4; SPECIFIC PERFORMANCE, 7.

PRACTICE.

1. *Reversal for receiving improper evidence.*—Where, on a motion for an injunction to restrain defendants from taking ore from beneath the surface of plaintiff's ground, the court has received incompetent evidence for defendants, and excluded material evidence offered by plaintiff, and it is reasonably apparent that the court was influenced thereby in denying the motion, the order will be reversed, even though the competent evidence received was sufficient to sustain the order. *Anaconda Co.* v. *Heinze*, 346

2. *Dismissal on one cause of action.*—Plaintiff having complained of trespass for ore taken with a second cause of action to quiet title and for an injunction, may dismiss the trespass count, the causes of action not being dependent on each other. *Montana O. P. Co.* v. *Boston Co.*, 471

3. *Where, upon cross-writs of error, a portion of a judgment is affirmed* and a portion reversed, the result is in effect, to reverse the entire judgment and remand the cause for a new trial, and no

PRACTICE. *Continued.*

part of such judgment can be pleaded as an adjudication in bar of another suit. *Empire State Co.* v. *Bunker Hill Co.*, 560

4. *Damages in equity case.*—Where the complainant sought the cancellation of a deed only, and did not ask for any legal relief, he was not entitled to a judgment for damages, even though the facts showed him to be entitled thereto. *Rubie Co.* v. *Princess Alice Co.*, 569

5. *After answer to the merits* it is too late to complain of indefinite description of the premises. *Davis* v. *Shepherd*, 575

6. *Mere expressions of opinion by the trial court* cannot be considered as parcel of its judicial findings. *Upton* v. *Weisling*, 601

7. *The rules of the circuit court of appeals requiring specific assignments of error* and reference to the page of the transcript containing the alleged error, must of necessity be strictly complied with. *Walton* v. *Wild Goose M. Co.*, 680

8. *A denial of new matter* in the replication to the answer may be on information and belief under the Alaska Code. *Id.*

See APPEAL; EVIDENCE; INSTRUCTIONS; JURY NON SUIT; TRESPASS; TROVER.

PRESUMPTION—See ANNUAL LABOR, 5; DISCOVERY, 3; EVIDENCE, 3; TENANTS IN COMMON.

PROHIBITION.

1. *Prohibition treated as certiorari.*—Where a final judgment has been entered by a court having no jurisdiction certiorari is the proper remedy. But a petition for prohibition bringing up the whole record, the court will pass upon the merits. *People* v. *De France*, 61

PROSPECTING CONTRACT.

1. *A grub stake contract* does not in general constitute the parties partners but it may be enlarged to contain terms which would constitute a partnership. *Hartney* v. *Gosling*, 239

2. *Outfitting to Alaska.*—An agreement whereby certain parties furnished one of their number with a fixed amount of money, he to go to Alaska, and prospect for a mine, and they, during his absence, to furnish his family with a stipulated monthly allowance for their maintenance, each of the parties to have a certain prescribed interest in whatever was found, could not be construed as binding the other parties for expenses incurred by the prospect-

PROSPECTING CONTRACT. *Continued.*

ing partner for personal supplies after, or even before, the sum originally furnished had been exhausted.

See PARTNERSHIP.

PROSPECTOR

1. *Prospector's application for license not assignable.*—Plaintiff had applied for but not yet obtained a license to mine for gold in Nova Scotia. The license, when obtained, was assignable, but any party doing work before the license issued was punishable criminally. Plaintiff nevertheless assigned to defendants the acreage applied for and defendants agreed to do a certain amount of work. *Held*, that defendants could not be held to a contract which required of them to do acts in violation of law. *Jones* v. *Holden*, 523

2. *Location without discovery.*—A location of a mining claim made without discovery is not entitled to the legal protection of an injunction except to the extent of the *pedis possessio;* that is, the claimant's actual workings. *Gemmell* v. *Swain*, 716

3. *Competing prospectors* cannot make use of the writ of injunction to secure priority of discovery or location on, or apparent superiority of right to a mining claim.

See INJUNCTION, 7.

PROSPECTUS.

1. *Suppression of facts.*—Promoters of mining enterprises, in the preparation of prospectuses, are bound to consider the effect that would be produced upon an ordinary mind by the statements contained in them, and in estimating the probability of persons being misled by them, the court may take into consideration not only the facts stated, but the facts suppressed. *Wiser* v. *Lawler*, 630

2. *Vendors of mining properties are not responsible for false statements, made in prospectuses* issued by a mining company to whom the properties had been sold, unless they knew or connived in such statements, or were active in putting them in circulation. While they may have known that prospectuses were being issued, they were under no obligation to read them, or contradict their statements or promises, or interfere with their circulation or distribution.

3. *If their title be of record they are not bound to give notice* of their rights in the property to the purchasers of stock, or to refuse the money due upon their contract of sale when it is tendered them.

PROTEST.

1. *A protestant is not a party* asserting his own rights, but an *amicus curiae*, suggesting irregularities. The right to protest is not the right to contest title. *Neilson* v. *Champagne M. Co.*, 438

2. *A protestant unsuccessful in the land office*, has no equity to pursue his assertions of error in the courts on the pretense that the government has passed its title through errors of law. *Id.*

3. *No location after entry.*—One whose assertion of title had its inception after defendant's entry in the land office cannot attack the patent nor allege a trust in the patentee. *Id.*

QUIET TITLE.

1. *Both titles to be determined in an adverse suit.*—Where the defendant in an action to quiet title by the locator of a mining claim alleges a conflicting location, and asks to have his title quieted, the court must pass on the validity of defendant's title as well as plaintiff's, though the latter need only be determined under a general denial. *Shattuck* v. *Costello*, 136

2. *Findings under Arizona practice.*—Under Rev. St. 1901, par. 1406, requiring the court on the trial of an issue of fact to make separate findings of fact and law, on which judgment shall be entered, a finding, in an action to quiet title to a mining claim in which defendant alleges a conflicting location and asks that it be quieted, that the court finds in defendant's favor on all the issues of fact, and that all the allegations of his cross complaint are true, is not sufficient to authorize judgment quieting defendant's title in described premises, but full findings of fact should be made. *Id.*

3. *Burden on each party.*—Where plaintiff in a suit to quiet title to a mining claim claims under a location subsequent to a conflicting location by defendant, who also asks to have his title quieted, the burden is on each of the parties to prove the validity of their location, the plaintiff having the duty of taking the lead in such proof. *Id.*

4. *Bill to quiet title while injunction suit pending.*—The pendency of a suit to enjoin the removal of ore from a mining claim by defendant as ancillary to an action of ejectment to recover possession of the part of the claim from which it was alleged that defendant was taking ore, is not a bar to a suit subsequently commenced by the same complainant to quiet its title to its entire claim, including extralateral rights not in controversy in the prior action. *Empire State Co.* v. *Bunker Hill Co.*, 560

See JURY.

RECEIVER'S RECEIPT.

1. *The holder of the receiver's receipt for mining claims* duly entered for patent is the owner of the fee and is in position to tender unobjectionable deed upon his contract to deliver "good and sufficient deed in fee simple" for the claims. *Bash* v. *Cascade M. Co.*, 299

2. *Under such contract* the parties will be held to have contracted for such title only as the vendor could convey, the vendee going into possession, making improvements and payments, obtaining an extension for making final payment, and offering a bonus for a further extension, all the time knowing the condition of the title, which was perfect, except that no patent had issued. *Id.*

See ADVERSE CLAIM, 3.

RELATION—See PATENT, 2.

RELOCATION.

1. *Amendment of defective records.*—Erroneous or defective location certificates may be amended under the provisions of section 5 of an act entitled "An act to define the manner of locating lode, quartz, and placer claims. * * * " Sess. Laws 1899, p. 237. *Morrison* v. *Regan*, 69

2. *Such amended location relates back* to the date of the original location, provided it does not interfere with the existing rights of others at the time when such amendment is made. *Id.*

3. *Proviso only applies where boundaries changed.*—The proviso to said section does not apply to amended locations, where, by the amendment, the surface boundaries are not changed, or when no part of an overlapping claim which has been abandoned is taken in by such amended location. Said proviso only applies where the boundaries are changed, or where part of an overlapping claim which has been abandoned is taken in. *Id.*

4. *The agent or any one authorized to do so* can make an amended or additional location. Such authority is not required to be in writing. *Id.*

5. *Over prior location not abandoned.*—Evidence in an action to quiet title to a mining claim in which the defendant sets up a prior location considered, and *held* to show that at the time of the defendant's location the claim was already covered by an existing valid location, and was not susceptible of relocation. *Shattuck* v. *Costello*, 136

6. *Admission by reference to prior location.*—On December 12, 1895, defendant located a mining claim. On January 1, 1896,

RELOCATION. *Continued.*

plaintiff located the same claim. In the ensuing suit to quiet title the issue was whether a prior location was existing at the time of defendant's location, so as to invalidate defendant's claim. On January 27, 1900, defendant filed location notices with the declaration that they constituted "a relocation of the ground formerly located by unknown parties, and abandoned in 1895 or 1896." *Held*, that the filing of relocation notices was an admission by the defendant that his location of December 12, 1895, was premature. *Id.*

7. *An invalid attempted relocation* of a mining claim does not effect an abandonment of the locator's prior valid location, and is immaterial so far as concerns another making a still later location. *Temescal Co.* v. *Salcido*, 360

See TENANTS IN COMMON, 7.

RENTS AND ROYALTIES.

1. *Assignee of half interest held for all the rent.*—A lessee of a gas lease, under which he was to pay a certain royalty, assigned an undivided one-half interest therein to a corporation, to hold subject to the royalty contained in the lease, and thereafter assigned the other one-half interest to a second company. The first corporation operated the land under an agreement to account to the second company for one-half of the proceeds, the latter company to pay one-half of the expenses. *Held*, that the first company was liable for the whole of the royalty. *Burton* v. *Forest Oil Co.*, 507

See FORFEITURE, 3; FRAUD, 2; LEASE.

RESCISSION.

1. *Restoration to status quo.*—On a bill to rescind it is essential that there be an offer to return the consideration or part consideration already received. *Rubie Co.* v. *Princess Alice Co.*, 569

2. *Rescission by parole.*—A written contract, sealed or unsealed, may be rescinded by word of mouth by common consent of its parties. If no possession has been taken under it, and the parties agree to rescind, and, in execution of the agreement to rescind, the vendee surrenders the writing to the vendor, the rescission is complete, and the contract at an end. *Lowther Oil Co.* v. *Miller-Sibley Oil Co.*, 656

RESERVATION—See LEASE, 8.

SPECIFIC PERFORMANCE.

1. *Specific performance of unequal contract never enforced.*—In an action to enforce specific performance of a contract, any fact showing that the contract is unfair, unjust, and against good conscience will justify the court in refusing such decree, though the contract may be enforceable at law, and there is no sufficient ground for its cancellation. *Federal Oil Co.* v. *Western Oil Co.*, 25

2. *Unilateral contract is of this class.*—A lease for the nominal consideration of $1, for the purpose of drilling and operating for oil and gas,—the lessor to receive a certain proportion of the oil and gas obtained,—which does not obligate the lessee to commence or prosecute such operations, and which he may terminate at his pleasure without compensation to the lessor, is unconscionable, and should not be enforced. *Id.*

3. *Binding only one party.*—The court will not decree that one party shall specifically perform a contract which the other party, at his option, may refuse to carry out. *Id.*

4. *No specific performance of option contract.*—Equity will not decree specific performance of a contract which is unfair or unconscionable, or where performance by the complainant is entirely optional, and no offer of performance is made. *Federal Oil Co.* v. *Western Oil Co.*, 429

5. *Instance: Lessee cannot delay sinking by paying rent.*—An oil and gas lease on 80 acres of land provided that, if a well was not commenced at once, the lessee should pay the lessor $8.75 per month during the delay. The lessor was to receive as a royalty one-eighth of the oil produced, and $100 per year for each producing gas well, together with gas for use in his residence. There was no limit as to time, no provision obligating the lessee to make any well, and the contract was terminable at its option. It drilled no well, but made the monthly payments for about eight months, when the lessor refused to accept further payments and leased to another party. *Held*, that the contract contemplated the exploration of the property at once; that the monthly payments were not a part performance, but merely a stipulated sum for delay in performance; and that the contract would not be specifically enforced, because of its want of mutuality. *Id.*

6. *Delay bars specific performance.*—Equity will not grant specific performance of a contract to convey land when the vendee has unreasonably delayed in performing the contract and asking relief, and conditions have changed, and it would work hardship and loss to the vendor or other persons affected thereby.—*Lowther Oil Co.* v. *Miller-Sibley Oil Co.*, 656

7. *Vendee out of possession.*—When a vendee has not possession

SPECIFIC PERFORMANCE. *Continued.*

under an executory contract of sale of land, in order to have equity to grant specific performance, he is held to greater diligence in performing the contract and asking performance than is the case of a vendee in possession under the contract. *Id.*

8. *Contract intended to defraud creditors.*—An executory contract for the sale of land, made with intent on the part of both parties to defraud creditors, will not be specifically enforced in equity at the instance of the guilty vendee, or one to whom he has sold the land. *Id.*

STATUTE OF FRAUDS.

1. *The Statute of Frauds* must be specially pleaded. *Cerrusite M. Co.* v. *Steele*, 456

STATUTE OF LIMITATIONS.

1. *Statute of limitations.*—A party who allows himself to be kept out of possession of a mining claim for seven years, the period barring action for recovery of real estate, loses his title to the same under the provisions of Rev. Stat. U. S. § 2332. *Lavagnino* v. *Uhlig*, 610

See ADVERSE POSSESSION.

STOCK.

1. *Stock issued in consideration of mining claims* at their prospective value, that is, value "which development is necessary to disclose," may be considered paid up although the parties' judgment should afterwards prove to be erroneous. *Buck* v. *Jones*, 467

See FRAUD, 6.

TENANTS IN COMMON.

1. *Presumption of purchase for joint benefit.*—The presumption is that a conflicting title bought in by one of the co-tenants was acquired to protect the common title; and the other co-tenants have a reasonable time after they learn to the contrary, that he claims adversely, to pay their proportion of the cost and get the benefit of it. *Cedar Canyon Co.* v. *Yarwood*, 11

2. *Co-tenant buys next claim to secure apex.*—Where a joint tenant of a mining claim purchases a controlling interest in a claim adjoining on the side line, for the reason that he supposes that the apex of the mine worked in the former claim is located in the latter, and for the sole purpose of protecting his interest

TENANTS IN COMMON. *Continued.*

in the former claim, and not as an independent investment, the purchase inures to the benefit of the co-tenants, and cannot be held by the purchaser as his separate property. *Id.*

3. *Cannot question the common title.*—A co-tenant who purchases a conflicting title, or his successor having notice of all the facts, will not be permitted, in the contest over the title, in which the other co-owners claim that the purchase of the conflicting title inures to their benefit, to question the common title of the co-tenants. *Id.*

4. *Where the trial court finds* that a corporation succeeding to the rights of the co-tenant in the adjoining claim purchased by him had knowledge of the co-tenancy, and the corporation does not except to such finding, it will be held on appeal to have had full notice of the rights of the other co-tenants in the conflicting title purchased by its grantor. *Id.*

5. *Practice on decree.*—Where the only issues in an action to determine conflicting mineral rights relate to a single lode, it is not error to refuse to quiet defendant's title to a half interest in the entire claim traversed by such lode, though plaintiff owns the remaining interest therein. *Id.*

6. *Co-tenant may bring accounting.*—A tenant in common of mining land may sue a co-tenant who has taken possession for an accounting, where such co-tenant has worked the mines and sold the deposits, since the action is not one to recover for the use and occupation or for rents and profits, but for a part of the estate itself which the co-tenant has taken and carried away. *Abbey* v. *Wheeler*, 86

7. *Where one of several co-tenants of a mining claim attempts* to relocate the same, his act inures to the benefit of his co-tenants. *Yarwod* v. *Johnson*, 398

8. *Mere lapse of time* does not dissolve the relationship of co-tenancy. *Id.*

See PARTNERSHIP.

TIMBER.

See MEASURE OF DAMAGES.

TOWN SITE.

1. *It is mines known to exist at the time a town-site patent is issued*, and those only, that are excepted from its grant by section 2392 of the Revised Statutes. *Larned* v. *Jenkins*, 94

2. *The town-site deed impervious to collateral attack.*—The deed

TOWN SITE. *Continued.*

of the city authorities authorized to convey lots in a town site is presumptively valid, and it cannot be collaterally assailed in an action at law for a failure of the authorities to require the preliminaries or perform the requirements antecedent to its execution. *Id.*

TRESPASS.

1. *Evidence of further trespasses* since the suit was begun was not admissible. *Wilkins* v. *Monson Co.*, 185

2. *Anticipated injuries.*—It cannot be assumed that defendant will continue to repeat the wrong or trespass, and damages for anticipated injuries cannot be allowed. *Id.*

See MEASURE OF DAMAGES, POSSESSION, 1.

TROVER.

1. *Defense of title in third person.*—In a jurisdiction where the rule prevails that a defendant in trover may defeat recovery by showing the ownership and right of possession of the property sued for in a third person, the same defense is available where the plaintiff elects to waive the tort and sue in assumpsit to recover the value of the property. *Phelps* v. *Church of Our Lady*, 233

TRUST.

1. *Burden of proof.*—A person alleging that a party holding the legal right to property is a trustee thereof, has the burden of proving the trust. *Scott* v. *Crouch*, 117

TUNNEL.

1. *The right of exploration* is given for the discovery of mineral only. *St. Louis M. Co.* v. *Montana M. Co.*, 127

2. *The different measurements of a tunnel* before and after the annual period show the amount of feet driven, and the value per foot being known, the calculation of the labor is mere matter of figures. *Yarwood* v. *Johnson*, 398

3. *Tunnel site need not adverse lode claim.*—The claimant of a tunnel site located across lode claims is not required by sections 2325, 2326, Rev. St. [U. S. Comp. St. 1901, pp. 1429, 1430], to file an adverse claim, when applications for patents of the lode claims are made, in order to protect his rights in those cases in which his interest in the lode claims is so uncertain, contingent, and

TUNNEL. *Continued.*

intangible that it cannot be fairly litigated when the applications are made. *Uinta Co.* v. *Creede Co.*, 445

4. *Lode patents subject to rights of tunnel sites located before the entries.*—Patents of lode mining claims based on entries made after the location of a claim for a tunnel site across them are subject to the rights of the claimant of the tunnel site in cases in which his rights therein were so uncertain, contingent, and intangible that they could not be fairly litigated when the applications for the patents were made. *Id.*

5. *Tunnel may attack the discovery of the patented lode.*—Entries and patents of lode mining claims in proceedings to which a claimant of a tunnel site, located across them prior to the entries, was not, and was not required to be, a party, will not estop him from establishing by the testimony of witnesses who know, and by other customary evidence, the fact that no discoveries of lodes or mines of mineral had been made in the lode claims before the claim for the tunnel site was located across them. *Id.*

See APEX, 5.

VENDOR AND PURCHASER.

1. *Where vendee of coal has the option to buy a part of the surface* at a fixed price his permanent occupation of the surface is an election to buy and pay for the ground he has occupied. *Potter* v. *Rend*, 1.

2. *Such obligation to pay* may be enforced by action at law and the aid of equity is not needed. *Id.*

3. *Contract between owners of overlapping claims—Estoppel.*—Plaintiff, the vendor, owned a lode claim which was overlapped by a prior placer claim belonging to defendant. Defendant agreed to buy the lode claim and to pay for it when patented. Afterwards by land office contest it forced the cancellation of the lode entry to the extent of the conflict. Defendant then refused to perfect its purchase: *Held*, That the subject matter of the contract was the lode claim less the conflict. But if otherwise the vendor could not plead vendor's inability to perform, when such inability was produced by its own act. *Griffin* v. *American G. M. Co.*, 709

See BONA FIDE PURCHASER, MECHANICS' LIEN, 1; OPTION, PROSPECTUS, 2; RECEIVER'S RECEIPT.

VERDICT.

1. *Sufficient description in verdict on apex suit.*—The jury returned a verdict that the vein apexed within the boundaries of the Refugee claim except that portion apexing between a point on

VERDICT. *Continued.*

the side line of defendant's claim eight feet westerly from the southeasterly corner of that claim and the point where it passed through the easterly end line of the latter, and that plaintiff was entitled to the possession of so much of the vein as apexed within the boundary of his claim, even though in its downward course it might depart from a perpendicular, so as to extend outside the vertical side lines of that claim, except so much of said claim as "you" find the apex thereof to be in defendant's claim. *Held*, that the verdict was sufficiently definite in its description of the premises to comply with the requirements of the Code. *Davis* v. *Shepherd*, 575

2. *The court may amend a verdict* to correct a patent verbal error. *Id.*

3. *Where a verdict in ejectment fails to find damages* claimed, its effect as a verdict for recovery of land is not vitiated. *Id.*

WAGES.

1. *Written followed by verbal contract.*—A written contract in general terms between the defendant company and its boarding house keeper was followed by a verbal contract in specific terms. A suit on such state of facts is based on the verbal contract. *Cerrusite M. Co. v. Steele*, 462

2. *It is within the powers of general manager* to make contract to protect the board and store account out of the miners' wages. *Id.*

See CONTRACT, 2.

WATER.

See INJUNCTION, 1.

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